United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 1167.

MARGARET H. WILLIAMSON, Plaintiff in Error,

versus

KATHERINE OSENTON, Defendant in Error.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston.

CERTIFICATE OF QUESTION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the general importance of one of the questions or propositions of law arising on the record, and the difference of opinion in this court as to the correct decision thereof, that that question, raised on said writ of error, be certified to the Supreme Court of the United States for instruction for its proper decision; and that accompanying said question there shall also be certified a statement of the facts on which such question or proposition of law arises and can be understood, which statement of facts and question are as follows:

Statement of Facts.

This suit was instituted on January 31, 1912, by Katherine Osenton, plaintiff below and defendant in error here to recover the sum of one hundred thousand ($100,000) dollars damages against Margaret H. Williamson, defendant below and plaintiff in error.

The plaintiff alleged in her declaration that she was a citizen of the State of Virginia. The summons was served on February 3, 1912. The defendant appeared specially and filed a plea in abatement to the jurisdiction of the court, alleging that the said Katherine Osenton, was, at the time of the institution of the suit, the lawfully wedded wife of C. W. Osenton, a citizen, resident and inhabitant of Fayetteville, Fayette County, in the Southern District of the State of West Virginia, and that she was not at the time of the institution of the suit a citizen of the State of Virginia.

To this plea the plaintiff below replied that prior to the institution of the action, her husband, C. W. Osenton had committed acts of adultery with the defendant, and had committed other unlawful acts such as entitled the plaintiff to maintain an action for divorce from him, the said C. W. Osenton, and that prior to the institution of the action she had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce had theretofore been granted by decree of the said Circuit Court; and long before the institution of her action she had separated from her husband and was, before, and at the time of institution of the action, living separate and apart from her husband; and that she had, prior to the institution of her action, removed to the said State of Virginia with the intention of remaining in said state for an indefinite period of time and to make her permanent home therein.

The record shows that after the institution of this suit, and before the said plea to the jurisdiction was filed, to-wit: on the 28th day of March, 1912, the said divorce suit resulted in a decree in favor of the plaintiff, granting her an absolute divorce from the said C. W. Osenton.

On the trial of the plea to the jurisdiction the parties agreed to, and filed the following statement of agreed facts:

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF WEST VIRGINIA. IN THE DISTRICT COURT THEREOF, TO-WIT:

Katherine Osenton
vs.
Margaret H. Williamson. } Trespass on the Case. No. 486.

Upon the plea that the plaintiff at the time of the institution of this action was not a citizen of Virginia it is stipulated and agreed by the counsel for plaintiff and counsel for defendant that for the consideration of and purpose of passing upon the plea of the defendant that the plaintiff at the time of the institution of her action was not a citizen of Virginia, the following are the facts:

That at the time of the institution of this suit the plaintiff was the lawfully wedded wife of C. W. Osenton, a citizen and resident of Fayette County, West Virginia; that prior to the institution of this action the said C. W. Osenton had committed violation of marital duty such as entitled the plaintiff to a decree of divorce *a vinculo;* that prior to the institution of this action the plaintiff had separated from her husband, the said C. W. Osenton, and had gone to the State of Virginia with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States Court; that prior to the institution of this action this plaintiff had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce from the matrimony aforesaid has heretofore been granted her by decree of said Circuit Court, and these facts are admitted for the purpose of this plea only.

C. BEVERLEY BROUN,
Attorney for Plaintiff,
Of Counsel for Plaintiff.
CHILTON, MACCORKLE & CHILTON,
Attorneys for Defendant.

The plea was overruled and the defendant pleaded to the merits. There was a verdict and judgment for the plaintiff for $35,000. A motion was made to set aside the verdict and grant a new trial, which was overruled, and the case comes to this court upon a writ of error; the assignment of errors raising, among other things, the question of the jurisdiction

of the District Court for the Southern District of West Virginia.

Question.

Was the plaintiff, upon the foregoing statement of facts, such a citizen and resident of the State of Virginia, at the time of the commencement of this action, as to entitle her to bring and maintain the same in the District Court of the United States for the Southern District of West Virginia?

It is ordered, that this certificate be entered in the records of this court and that a certified copy of the same be transmitted to the Supreme Court of the United States.

Witness our hands this 7th day of June, 1913.

J. C. PRITCHARD,
Senior Circuit Judge.
JAS. E. BOYD,
District Judge, Western District of North Carolina.
H. G. CONNOR,
District Judge, Eastern District of North Carolina.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, }
Fourth Circuit, } *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the original certificate of the question or proposition of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix {Seal of Court} the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 12th day of June, A. D., 1913.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

IN THE

Supreme Court of the United States

October Term, 1913.

No. 634.

MARGARET H. WILLIAMSON, *Plaintiff in Error,*

vs.

KATHERINE OSENTON, *Defendant in Error.*

Upon Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes to this court upon a certificate from the Circuit Court of Appeals for the Fourth Circuit. The certificate and the question propounded are as follows:

"This suit was instituted on January 31, 1912, by Katherine Osenton, plaintiff below and defendant in error here, to recover the sum of one hundred thousand ($100,000) dollars damages against Margaret H. Williamson, defendant below and plaintiff in error.

"The plaintiff alleges in her declaration that she was a citizen of the State of Virginia. The summons was served on February 3, 1912. The defendant appeared specially and filed a plea in abatement to the jurisdiction of the court, alleging that the said Katherine Osenton was, at the time of the institution of the suit, the lawfully wedded wife of C. W. Osenton, a citizen, resident and inhabitant of Fay-

etteville, Fayette County, in the Southern District of the State of West Virginia, and that she was not at the time of the institution of the suit a citizen of the State of Virginia.

"To this plea the plaintiff below replied that prior to the institution of the action, her husband, C. W. Osenton, had committed acts of adultery with the defendant, and had committed other unlawful acts such as entitled the plaintiff to maintain an action for divorce from him, the said C. W. Osenton, and that prior to the institution of the action she had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce had theretofore been granted by decree of the said Circuit Court; and long before the institution of her action she had separated from her husband and was, before and at the time of the institution of the action, living separate and apart from her husband; and that she had, prior to the institution of her action, removed to the said State of Virginia with the intention of remaining in said State for an indefinite period of time and to make her permanent home therein.

"The record shows that after the institution of this suit, and before the said plea to the jurisdiction was filed, to wit: on the 28th day of March, 1912, the said divorce resulted in a decree in favor of the plaintiff, granting her an absolute divorce from the said C. W. Osenton.

"On the trial of the plea to the jurisdiction the parties agreed to and filed the following statement of agreed facts:

"'That at the time of the institution of this suit the plaintiff was *the lawfully wedded wife of C. W. Osenton, a citizen and resident of Fayette County, West Virginia;* that prior to the institution of this action the said C. W. Osenton had committed violation of marital duty such as entitled the plaintiff to a decree of divorce *a vinculo;* that prior to the institution of this action the plaintiff had separated from her husband,

the said C. W. Osenton, *and had gone to the State of Virginia with the intention of making her home in that State for an indefinite time in order that she might institute this suit against the defendant in the United States Court;* that prior to the institution of this action this plaintiff had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce from the matrimony aforesaid has heretofore been granted her by decree of said Circuit Court, and these facts are admitted for the purpose of this plea only.'

"This plea was overruled and the defendant pleaded to the merits. There was a verdict and judgment for the plaintiff for $35,000. A motion was made to set aside the verdict and grant a new trial, which was overruled, and the cause comes to this court upon a writ of error; the assignment of errors raising, among other things, the question of the jurisdiction of the District Court for the Southern District of West Virginia.

QUESTION.

"Was the plaintiff, upon the foregoing statement of facts, such a citizen and resident of the State of Virginia, at the time of the commencement of this action, as to entitle her to bring and maintain the same in the District Court of the United States for the Southern District of West Virginia?"

STATEMENT.

This action was originally brought in the District Court of the United States for the Southern District of West Virginia. It then went to the Circuit Court of Appeals for the Fourth Circuit; and one of the questions to be decided by the last named court was, the question of the jurisdiction of the District Court of the United States for the Southern District of West Virginia. The jurisdiction was brought in

issue because it was contended by the defendant in that court that it does not sufficiently appear that Katherine Osenton was, at the time of the institution of the action, a citizen of the State of Virginia, the defendant below being a citizen of West Virginia. On the issue thus raised the facts were agreed, as set forth in the foregoing certificate.

The simple question for this court to decide is, whether or not the District Court had jurisdiction by reason of diverse citizenship, that being the only ground of its jurisdiction. The agreed facts, as set forth above, are, in detail, as follows:

1st. The plaintiff, at the time of the institution of the suit, was the lawfully wedded wife of C. W. Osenton, a citizen and resident of Fayette County, West Virginia.

2d. Prior to the institution of the suit, the said C. W. Osenton had committed a violation of marital duty such as entitled the plaintiff to a decree of divorce *a vinculo*.

3d. Prior to the institution of the suit the plaintiff had separated from her said husband and had gone to the State of Virginia.

4th. The intention of the plaintiff in going to the State of Virginia was to "*make her home in that State for an indefinite time in order that she might institute this suit in the Federal Court.*"

5th. Before the institution of the suit the plaintiff had instituted in the courts of West Virginia a suit for divorce, which divorce had not been granted when this suit was brought in the Federal Court, but was granted while the suit in the Federal Court was pending.

The contention of the defendant below (now plaintiff in error) is that it is immaterial for the purposes of this case whether the divorce was granted or not, and that all reference to the result of the divorce case might have been left out of the statement of facts, for the well known reason that the inquiry as to the jurisdiction has to be confined

to the time when this suit was instituted in the Federal Court. All questions of jurisdiction must be determined by the status of the parties at the time of the institution of the suit. If the plaintiff was a married woman at the time of the institution of the suit, the fact that she secured a divorce from her husband afterwards will not aid her in maintaining jurisdiction in the Federal Court. This proposition is too well settled to justify discussion.

Mansfield vs. Swan, 111 U. S., 379.
Metcalf vs. Watertown, 128 U. S., 586.
Stevens vs. Nichols, 130 U. S., 230.
Jackson vs. Allen, 132 U. S., 34.
Mattingly vs. R'y., 158 U. S., 53.
Ins. Co. vs. Tempkins, 41 C. C. A., 490.
Brizel vs. Salt Co., 73 Fed., 13.

We shall therefore confine our discussion of the case to the first four facts above set forth, which alone relate to the status of the parties at the time the suit was instituted in the Federal Court.

The contention of the plaintiff in error is, that when the defendant in error instituted this suit in the said court she was a married woman, and her citizenship must be determined by that of her husband, which was in the State of West Virginia. But even if it be conceded that the husband and wife can have different citizenships in different States at the same time, then the record here does not show that the wife, in fact, gained a citizenship in Virginia prior to the institution of this suit. There is nothing to guide us here but the statement of facts recited above.

ARGUMENT.

Our first point is that a married woman cannot, even where she has grounds for leaving her husband, acquire another domicile, except for the purpose of bringing a suit directly involving the marriage relation.

Since it is well settled at common law that a wife could not have any existence separate from her husband, nor even civil rights, nor separate personal estate, she could not have a separate domicile. The only reason for a separate domicile would be to exercise some civil right, such as the institution of a suit, or for the purpose of having her estate administered, in a jurisdiction other than his. Therefore, it was universally held that the domicile of the wife followed that of her husband until the marriage was dissolved by death or absolute divorce. This was in line with the principle that all dependent persons have the domicile of the person upon whom they are dependent. The fact that the wife lived apart from her husband; that they had separated by agreement; or that the husband had been guilty of misconduct, such as would furnish a defense to a suit by him for restitution of conjugal rights, did not, in England, enable the wife to acquire a separate domicile.

Warrender vs. Warrender, 2 C. & F., House of Lords, 488.

Dolphin vs. Robins, 7 House of Lords, 390.

Yelverton vs. Yelverton, 1 Swab & Trust, Probate 574.

This last case holds that the husband's wilful separation and bigamous marriage were not sufficient to give her a separate domicile.

We concede that a line of decisions in the United States recognizes that, for certain purposes, a wife can secure a separate domicile from that of her husband, but a careful analysis of these cases will show that they are limited in their application, and that the true rule is laid down in Bishop on Marriage and Divorce (4th Ed., Vol. II, Sec. 129), and upon sound reasons.

In the United States it has been held that a divorce *a mensa et thoro* gives the wife all the rights to acquire a

separate domicile for all purposes, and she can sue her husband in the Federal court as a citizen of another State than his.

Barber vs. Barber, 21 How., 482.
Bennett vs. Bennett, Deady, 299.

Still other cases hold that even without judicial separation a woman can acquire a separate domicile *for the purpose of an action against her husband* if the husband commit acts that would entitle her to a judicial separation or divorce.

Dotson vs. Dotson, R. I., 87.
Hartean vs. Hartean, 14 Pick., 181.

Even that she can go to another State and acquire a domicile for purposes of such action is upheld.

Atherton vs. Atherton, 155 N. Y., 129.
Hunt vs. Hunt, 72 N. Y., 217.
White vs. White, 18 R. I., 292.
Smith vs. Smith, 43 La., 1140.

In Smith vs. Smith, *supra*, the court said:

> "Although the law fixes the domicile of the wife as being that of her husband, universal jurisprudence recognizes an exception to the rule where the husband's conduct has been such as to furnish lawful ground for divorce which justifies her in leaving him, and therefore necessarily authorizes her to live elsewhere, and to acquire a separate domicile."

In Irby vs. Wilson, 1 Dev. & B. Eq., 568-582, it is laid down:

> "That the fiction that the domicile of the husband is that of the wife is never allowed even in the common law, to obscure, much less defeat, justice, and

where the husband and wife *have adversary interests in a suit between them*, her domicile is where she actually resides."

It is not asking too much to solicit a careful scrutiny of the distinction running through the authorities, of the difference between a direct and a collateral application of the rule that the wife may acquire a new domicile. In Barber vs. Barber, 62 U. S., 582, sec. 728 of Bishop's Com. is quoted with approval to the effect that courts do not recognize the new domicile in a collateral proceeding. Again, in Hartean vs. Hartean, 14 Pic., 181, 185, Chief Justice Shaw makes the same distinction. Where the marriage relation is in issue the domicile of the wife is readily permitted to be shown to be other than that of her husband. But the courts are slow to permit her to change her domicile to sue third parties, for the reason that the marriage relation is sacred and third parties do not know the reasons which might be present for a change of domicile as the husband would.

In Calvin vs. Reed, 55 Pa. St., 379, it is held that the wife may acquire a separate domicile *when either proceeds against the other*, as it is the necessary effect of their being opposite parties in the same proceeding.

It will be noticed in reading all the cases where the question of the wife having a separate domicile was at issue that the courts sustain it only for the purpose of enabling her to sue her husband or have her estate administered in a separate domicile from his.

But without the provocation of wrongful acts which entitle her to a divorce, or without a judicial separation, a wife cannot establish a domicile separate from that of her husband.

Anderson vs. Watt, 138 U. S., 694.
Cheely vs. Clayton, 110 U. S., 706.
Loker vs. Gerald, 157 Mass., 42.

The general rule is that a *voluntary* separation will not give to the wife a different domicile in law from that of her husband.

Barber vs. Barber, 21 How., 582-594-5.

Bishop, Marriage and Divorce, 4th Ed., Vol. II, Sec. 129, says, that even if ill conduct of husband had driven the wife away *that for other purposes than divorce* her domicile must be taken to be the same with his, *because the question of his wrong to her could not be enquired into,* and therefore, the law, *in the absence of such an inquiry or the facts,* would presume she had domicile with her husband.

There are a few cases that hold that even in a voluntary separation, that is without ground upon which a separation or a divorce could be maintained, the wife can acquire a domicile that would give the court of her residence jurisdiction to settle her estate despite the domicile of her husband being in another jurisdiction.

Matter of Florence, 54 Hun. (N. Y.), 328.

Rundle vs. Van Innegan, 9 Cir. Pro. Rep. (N. Y.), 330.

Lyon vs. Lyon, 30 Hun., 455.

Schute vs. Sargent, 67 N. H., 305.

In California, in the matter of the estate of Wickes (128 Cal., 270, and other cases), the court holds otherwise, laying down the doctrine that—

> "In actions for divorce the presumption that the domicile of the husband is the domicile of the wife does not prevail. Of course, for all other purposes her forum is where her husband has his domicile." * * * "We must not in this connection confound

the right to a separate home or actual residence with the question of domicile. At common law, the right of the wife to a separate home was often recognized and secured, but that fact did not, nor *did even a judicial separation* enable her to acquire another and different legal domicile. To a large extent it is a question *as to the forum in which the wife shall assert her legal rights.* * * * For the protection of the wife she is allowed a different forum, when necessary in legal proceedings, against her husband. In reality *this is not giving her a new domicile,* but she is allowed to bring these suits where she actually resides though that be not her legal domicile."

Thus, for divorce, the American courts have held that a wife can acquire a domicile separate from that of her husband, and even if separated without judicial decree, that in New Hampshire and New York the courts of her actual residence can administer on her estate.

In the case under consideration it may be admitted from the fact that the plaintiff below subsequently obtained a divorce from her husband, that she had grounds to leave his domicile and acquire another for the purpose of suing him.

But she did not acquire another domicile in Virginia for that purpose, and if she had she could not have sued for divorce in the Federal Court, but would have been confined to the State Courts.

As she had not been judicially separated from him when she instituted her suit, and the action was not one against him, she could not, for the purpose of suing a third party for damages, claim her right to sue as a citizen of Virginia, because of wrongful acts committed by her husband.

With the exception of the few probate cases referred to *supra*, all the decisions, including those of the United States

Supreme Court, hold that a wife who is not judicially separated from her husband can only acquire a domicile separate from her husband for the purpose of proceeding against him either for divorce or to recover something due from him. For all other purposes she remains his wife and he can only institute legal proceedings as a citizen of his jurisdiction.

In Hartean vs. Hartean, 14 Pick., 181, cited with approval in Anderson vs. Watt, 138 U. S., 694-706, *supra*, the court said:

> "But the law will recognize a wife as having a separate existence, and separate interests and separate rights, *in those cases* where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish interests."

In Thompson vs. Stolman, 139 Fed., 93, it is laid down that where the plaintiff in a Federal Court is a married woman who has lived for three years in a State other than her husband's domicile she will be considered, for the purposes of jurisdiction, as a citizen of the State of her husband. See also Nicholas vs. Nicholas, 92 Fed., 1.

In answer to this contention the defendant in error cites a number of authorities which we desire to review briefly. The first is 39 Wis., 651.

That was a divorce case in which all that is held is that the general rule that the domicile of the wife follows that of her husband is inapplicable, at least under the statute of Wisconsin, in a case of divorce where the parties are actually living in different jurisdictions.

The next authority cited is Haddock vs. Haddock, 201 U. S., 562. This was a case involving what is known as the "full faith and credit" clause of the Constitution. There a suit was brought in a State other than the domicile of

matrimony against a wife who was still residing in that State of the domicile, and it was held that such a divorce was not a proceeding *in rem* as to marriage relation, and was not entitled to be enforced outside the territorial jurisdiction of the court.

In that case the court approved the decision in Atherton vs. Atherton, 181 U. S., 155, which held that where the husband and wife had a matrimonial domicile in Kentucky and she left him and returned to her mother's at Clinton, in the State of New York, and he afterwards sued her in Kentucky and got a divorce, that such a decree was a bar to her petition for divorce in New York.

In matter of Florence, 54 Hun., 328: That was a case involving the probate of the will of a wife. She had lived apart from her husband for twelve years with her three children, and had made her home in the State of New York during all of that time, while her husband remained in the city of Philadelphia, where they had both lived prior to their separation, and that during the whole of that twelve years the husband had not contributed anything towards the support of his wife or their children. The court held that she was a resident of New York "within the meaning of the statute in relation to proceedings before the surrogate" for the admission of wills to probate. The syllabus states the following: "That the old rule with reference to a married woman's domicile can not longer prevail in view of the rights which have been conferred upon her by statutory authority." In that case they had agreed to live separate and she had agreed to support herself and her children, and with his consent she had acquired a domicile in New York and had made that her home and that of her children. The court goes on in its decision and explains how the statute has extended the rights of a wife and shows the reason why the rule should not apply in that case.

The next case, 87 Tenn., 78, is where the wife abandoned

the husband and took up her residence in another State; and in that case the court held to the old rule, to wit. that she, having remained out of the State without the consent of her husband, had forfeited her right to homestead in lands owned by the husband.

The next case is 55 N. Y. Supp., 861, which but lays down the rule in the case of divorce proceedings where the wife, having grounds for divorce, may acquire a domicile elsewhere than that of her husband.

The next case, 56 L. R. A., 865, was where the court holds that a married woman, unlawfully deserted by her husband, may, without the necessity of a decree of court, establish an independent domicile in another State. The case was an action brought in 1903 in Massachusetts by the wife against the Town of Watertown for personal injuries received by her. The defendant maintained that she had been married in Massachusetts, had lived with her husband in Massachusetts, and consequently could not acquire a domicile in Rhode Island under the general rule. The jury made a special finding of fact that the plaintiff went to Rhode Island before the date of the writ "with the intention of living there *permanently.*" It was shown that the husband and wife lived together at Lowell, Massachusetts, until 1892 or 1893, when her husband deserted her and has never lived in Lowell since, and had never contributed to her support and that she had not seen nor heard from him since, and at the time of the trial she did not know whether he was alive or not. We certainly think there would be no error in a court or jury finding that where the wife had been deserted *for twelve or thirteen years and had not even seen or heard of her husband for that length of time,* and where she had, *in fact,* changed her residence and gone to another State, under such circumstances she had acquired a new domicile. In passing, we want to emphasize the word "permanent" in the decision of the court in the case just cited.

The jury found, and the court held, that the wife had gone to another State with the intention of making it her *permanent* home and had remained in that State as her permanent home for about ten years. This is the case from which lengthy quotations are made in the brief for defendant in error.

The next case cited is 140 Federal, 79. This was a case where the husband deserted the wife and left her helpless and went to another State and lived in adultery with another woman, and the court held that, under these circumstances, the wife could acquire a domicile elsewhere than in the husband's domicile. In so far as that case may be persuasive here, it can not be antagonistic to our position.

After examining the cases it seems to us that the following propositions are to be deduced therefrom:

1st. The presumption is that the husband's domicile is the wife's.

2d. If the wife can obtain a separate domicile, while the husband maintains the matrimonial domicile, it may be done for the purpose of suing for divorce, or for bringing a direct proceeding against him.

3d. In the cases where the courts have held that the wife may obtain a separate domicile, the husband has, in fact, deserted her, and she was left helpless in protecting her rights unless the rule of law would bend to the actual facts.

4th. Not a case is cited holding that where the wife has deliberately deserted the husband and the matrimonial domicile and gone to another State, she thereby acquires, immediately, a new domicile.

In this case, whatever else may be said, the husband did not desert the wife nor the home.

The cases cited show why the wife desired or needed a separate domicile, and in each case the change of domicile was natural. In some the husband deserted her and went to another State, she remaining at the matrimonial domicile; and

the question was, should the rule go so far as to change the actual fact of her domicile and make it, in law, wherever her husband might go, even though he was at fault and did not support her?

In this case the record does not support the contention of the defendant in error as to the immediate reasons for the desertion of the wife. Grounds for a legal separation or divorce were present, but that the wife left her husband for that reason does not appear. It may be said that the contrary appears. The agreed facts show that she left her husband *"in order that she might institute this suit in the United States Court,"* and no other reason is given.

No oppression, no cruelty, no failure to provide for her appears in the record. She had already instituted her suit for divorce. It was, therefore, not necessary to change her domicile for that purpose. As a matter of law, she could have brought this suit, and may still bring it, in the State courts of West Virginia, and that without regard to her domicile.

Even the time which she has spent and may spend in an effort to impose upon the Federal jurisdiction will be deducted from the period of the statute of limitations, if this court shall hold that the Federal Court has no jurisdiction. Tompkins vs. Ins. Co., 53 W. Va., 484. (The syllabus does not state the point, but it clearly appears in the opinion.)

Our fight here, if successful, will still leave her free to sue in the State Courts; or in the Federal Court, if, meanwhile, she has, in fact, acquired citizenship in a State other than West Virginia.

So far as the record discloses, her purpose in changing her domicile was to enable her to bring this suit in the Federal Court, seeing that she could not do so without making that change.

We therefore think that we are conservative in stating that the record here does not show a case that would take the plain-

tiff out of the general rule that the domicile of the husband is the domicile of the wife.

But let us concede for the purpose of argument, not only that the authorities justify an exception to the general rule, but further, that the plaintiff at the time of the institution of this suit, was in a position to put herself within the exception. With this concession we still maintain that the record does not show that the plaintiff at the time of the institution of this suit was a citizen of Virginia. For convenience, we quote again from the agreed facts: *"That prior to the institution of this action the plaintiff had separated from her husband, the said C. W. Osenton, and had gone to the State of Virginia with the intention of making her permanent home in that State, in order that she might institute this suit against the defendant in the United States Court."*

Here are the facts and all the facts. From these, and from these alone, must the citizenship of the plaintiff below be necessarily inferred. In the authorities, as well as from common sense and experience, there is a clear difference between "home" and "domicile." Many people make their homes in Washington, while their domicile and their citizenship may be in various parts of the world or in the States. One's home is where he is living at the time. It may be temporary or it may be permanent. If it be the permanent home it may be the domicile. As Chief Justice Marshall said in 12 U. S., 353: "The intention which gives a domicile is an unconditional intention to 'stay always.'" And he goes on to show that a mere residence under certain circumstances, or even "particular circumstances," would seem, at most, to prove only an intention to remain so long as those circumstances continue the same or equally advantageous. "This does not give a domicile."

In Morris vs. Gilmer, 129 U. S., 328, the law is stated thus: "There must be an actual, not pretended, change of domicile." In other words, the removal must be a real one, *animo manendi*, and not merely ostensible.

In Case vs. Clark, 5 Mason, 70, it is held that "the intention and the act must concur in order to effect such a change of domicile as constitutes a change of citizenship. There must be, to constitute it, actual residence in the place with the intention that it is to be a principal and permanent residence." See also Mitchell vs. U. S., 21 Wall, 350; Desmare vs. U. S., 93 U. S., 605; Ennis vs. Smith, 14 How., 400.

In Alabama Company vs. Carroll, 28 C. C. A., 207 (84 Fed., 772), it was held that where it did not appear that the intention of the plaintiff to leave the State of his residence was "to change his domicile," and a change was necessary in order to support the jurisdiction, a Federal Court is justified in taking the case from the jury and directing a dismissal.

In Chicago and Northwestern R. R. Co. vs Ohle, 117 U. S., 123, it was held: "The charge as given covered the requests that were made. It stated clearly to the jury what was necessary in order to make a change of citizenship; and we are unable to find anything wrong in the rules that were laid down. The jury were told as distinctly as it could be expressed in words, that Ohle did not gain a citizenship in Illinois when he went there on the 6th of November, unless he did in good faith leave Iowa, and giving up his residence there go to Illinois, and actually and in good faith take up his permanent residence in that State at that time."

Indeed, in the case so much relied upon by the defendant in error, Greaves vs. Watertown, 56 L. R. A., 866, the court held that the finding of the jury and the facts in the case established that the intention of the plaintiff when she went to Rhode Island was to live in that State *permanently*. To the same effect are Allen vs. Railway Co., 70 Fed., 370; Lumis vs. Rosenthal, 67 Fed., 370; Kingman vs. Holthaus, 59 Fed., 305. These cases only announce the rule of law and common sense that one can not imagine the idea of domicile and citizenship except at the place of one's permanent home, that is, the place of actual and permanent abode to which one looks in all relations of life, and through all the

vicissitudes of fortune, as the place of final and permanent abode. Only such a place can be the domicile or the place of citizenship, and such a place is described in the authorities as the *permanent home*. In the case at bar a wife who has been living with her husband in West Virginia suddenly deserts that home and goes to the State of Virginia, and while still a wife, institutes a suit in West Virginia and invokes the jurisdiction of the Federal Court on the ground that she became a citizen of the State of Virginia as soon as she landed on the soil of the Old Dominion. Against such a claim is the presumption of her domicile in the State of West Virginia and the absence of any reason for going to Virginia except for the purpose of instituting this suit. Is it asking too much that the Federal Court will require her to rebut that presumption; and will it go so far as to permit her to rebut that presumption, without even showing that she claims the new home as a *permanent* one? If so, then a married woman domiciled with her husband could change her residence more easily than a man. No reason is given for going to the State of Virginia. It does not appear that she had any status in that State prior to her desertion of her husband. The "home" tie in the State of Virginia does not appear. Speaking from the record, she had neither relatives nor friends in that State. Her removal to Ohio, Kentucky, Maryland or New York "for an indefinite time in order that she might institute this suit," would have accomplished the same purpose, according to the theory of the defendant in error, as her removal to Virginia. If the agreed facts had stated that the plaintiff below removed to Virginia for the purpose of making that her "permanent home," or if it had stated that the removal to Virginia was to make that State her "home" for "an indefinite time," and "without any intention of returning," then there would be something in the contention of the plaintiff. But we submit that each and every part of the agreed facts must be read

and considered in determining the paramount question: Was the plaintiff below in good faith a citizen of Virginia at the time of the institution of the suit? The sole reliance of the defendant in error is upon the words "home for an indefinite time." And they ask this Court to ignore the qualifying clause, to wit, "in order that she might institute this suit;" and further to ignore the fact that the burden of showing a change of residence is upon her and the absence of any circumstances showing any reason why Virginia should be selected as the residence to be used to get into the Federal Court rather than any other State that might have come to her mind when she deserted her husband in West Virginia. We submit that a fair interpretation of the agreed facts lead to the conclusion that Virginia was not intended by the defendant in error to be her *permanent* home and that the "indefinite time" of making that State her home was to be measured by the purpose for which she went to Virginia, to wit, "in order that she might institute this suit," and when this suit should be ended she would return to West Virginia. If she had intended Virginia to be her permanent home she could have shown it and it would have been in the record. If she had had no intention of returning to West Virginia she could have shown it and it would have appeared in the record. If there were any facts or circumstances to tie her to Virginia any more than to any other State or Territory of the Union she could have shown them, and they would have appeared in the record. In short, if she had had any purpose on earth for going to Virginia, except the sole purpose of bringing this suit immediately in the Federal Court, she could have shown it and it would have appeared in the record. With two burdens of proof resting upon her, to wit, that of overcoming the presumption of her domicile in West Virginia, and that of showing an actual change from one domicile to another, she has not only failed in her showing, but has actually furnished almost positive proof that she had no intention of making Virginia her permanent home, but

went there solely for the purpose of perpetrating a fraud upon the Federal jurisdiction.

The agreed facts establish the lack of jurisdiction in the Federal Court as much by what they fail to show as by what they show. We respectfully submit that this case comes within the rule laid down in Morris vs. Gilmer, 129 U. S., 328, and the other cases to the same effect which we have cited. Can it be doubted that this was a pretended change of domicile, and not an actual one; an ostensible removal to Virginia and not a permanent taking up of her residence in that State, *animo manendi*?

In the case of Morris vs. Gilmer, above quoted, the plaintiff who sought the Federal court made frequent and public declarations of his intention and purpose to change his residence, yet the court saw through the fiction and decided that his purpose was to commit a fraud upon the law in order that he might avail himself of the jurisdiction of the Federal Courts, and dismissed the case. The court is not put to the trouble here of weighing the circumstances, which show the fraud, as the court had to do in the case of Morris vs. Gilmer, *supra*. Here the agreed facts were eloquent in their silence of those essentials to show an abandonment of the matrimonial domicile, and a permanent home elsewhere. They are likewise unmistakable in showing a clear purpose to impose upon the jurisdiction of the Federal Court. The Federal Courts have been vigilant that this shall not be done. They have not only held that it is the duty of the trial court to dismiss the case when it appears at any stage that a fraud has been committed upon its jurisdiction, but that even the Appellate Court will cause such dismissal when the fraud is alleged for the first time before it, and proof thereof is made by affidavits.

The following adjudications of this court show how careful it has been to confine its jurisdiction in cases of this kind to those which arise between actual citizens of different States:

Inhabitants vs. Stebbins, 109 U. S., 341.
Eberly vs. Moore, 24 How., 147.

Williams vs. Town of Nottawa, 14 Otto, 209.
Hawes vs. Contra. Co. et al., 14 Otto, 450.
City of Detroit vs. Dean, 16 Otto, 537.
Hayden vs. Manning, 16 Otto, 586.
Farmington vs. Pillsbury, 114 U. S., 138.
Cashman vs. Amador Co., 118 U. S., 58.
Little vs. Giles, 118 U. S., 596.
City of Quincy vs. Steel, 120 U. S., 241.
Morris vs. Gilmer, 129 U. S., 315.
Shreveport vs. Cole, 129 U. S., 36.
Nashua vs. Boston, 136 U. S., 356.
Lehigh vs. Kelly, 160 U. S., 327.
Lake County Commissioners vs. Dudley, 173 U. S., 243.
Corbus vs. Alaska Co., 187 U. S., 455.
City of Dawson vs. Columbia Ave. Co., 197 U. S., 178.
Jones vs. League, 18 How., Sec. 76.
Anderson vs. Watt, 138 U. S., 694.

We do not pretend to deny the authority of South Dakota vs. Carolina, 192 U. S., 311, and the other cases cited by defendant in error, such as Dickerson vs. Northern Trust Co., 176 U. S., 181, but fail to see their application here.

We do not deny the rule that usually the court will not inquire into the motives of a party in doing an act such as making an assignment or changing his domicile. While we do not care why the plaintiff below wanted to invoke Federal jurisdiction, we do care to know why she went to Virginia just before instituting this suit. That is the issue being tried, because one's domicile is part conduct and part intention.

The court will not hold that one is not a citizen of a State when, in fact, he is a citizen, solely because his purpose in becoming such a citizen was to enable him to bring a suit. But upon the inquiry into citizenship the purpose in going to an-

other place is material. Here it is controlling, because there is no other guide. If she was, in fact, a citizen of the State of Virginia, then she is none the less a citizen of that State because her purpose in becoming a citizen was to bring this suit. But the first thing to determine was whether or not she was a citizen of the State of Virginia, and in deciding that question her every purpose in going to Virginia is to be considered, and it is shown here that her only purpose in going to Virginia was to enable her to bring this suit. That purpose would be harmless in a citizen of Virginia or West Virginia. If she were, in fact, a citizen of Virginia it makes no difference what her purpose was. But if she went to Virginia for the purpose of enabling her to bring this suit, and had no business, social or family-tie in that State, and went there only for an indefinite time, and it does not appear that she intended to make that her permanent home, and all the time was the wife of a citizen of the State of West Virginia, he maintaining in the last named State the matrimonial domicile, then those facts alone do not establish her citizenship in Virginia.

Here we are trying to ascertain the intention of a litigant when she went suddenly to the State of Virginia. The only index to that intention, which she gives, is the statement that she might enable herself to bring a suit which she could not bring if she had remained in West Virginia.

From every standpoint we feel justified in contending that the plaintiff below failed to establish her citizenship in Virginia, and we respectfully ask that the question propounded by the Circuit Court of Appeals for the Fourth Circuit be answered in the negative.

Respectfully submitted,

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Counsel for Plaintiff in Error.

In the Supreme Court of the United States

NO.

MARGARET H. WILLIAMSON, PLAINTIFF IN ERROR,

vs.

KATHERINE OSENTON, DEFENDANT IN ERROR.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The statement of facts in the certificate of the Circuit Court of Appeals, being concise, we can do little better than quote from it.

"This suit was instituted on January 31, 1912, by Katherine Osenton, plaintiff below and defendant in error here to recover the sum of one hundred thousand ($100,000) dollars damages against Margaret H. Williamson, defendant below and plaintiff in error.

"The plaintiff alleged in her declaration that she was a citizen of the State of Virginia. The summons was served on February 3, 1912. The defendant appeared specially and filed a plea in abatement to the jurisdiction of the court, alleging that the said Katherine Osenton, was, at the time of the institution of the suit, the lawfully wedded wife of C. W. Osenton, a citizen, resident and inhabitant of Fayetteville, Fayette County, in the Southern District of the State of West Virginia, and that she was not at the time of the institution of the suit a citizen of the State of Virginia.

"To this plea the plaintiff below replied that prior to the institution of the action, her husband, C. W. Osenton, had committed acts of adultery with the defendant, and had committed other unlawful acts such as entitled the plaintiff to maintain an action for divorce from him, the said C. W. Osenton, and that prior to the institution of the action she had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce had theretofore been granted by decree of the said Circuit Court; and long before the institution of her action she had separated from her husband and was, before, and at the time of the institution of the action, living separate and apart from her husband; and that she had, prior to the institution of her action, removed to the said State of Virginia with the intention of remaining in said state for an indefinite period of time and to make her permanent home therein.

"The record shows that after the institution of this suit, and before the said plea to the jurisdiction was filed, to-wit: on the 28th day of March, 1912, the said divorce suit resulted in a

decree in favor of the plaintiff, granting her an absolute divorce from the said C. W. Osenton.

"On the trial of the plea to the jurisdiction the parties agreed to, and filed the following statement of agreed facts:

" 'That at the time of the institution of this suit the plaintiff was the lawfully wedded wife of C. W. Osenton, a citizen and resident of Fayette County, West Virginia; that prior to the institution of this action the said C. W. Osenton had committed violation of marital duty such as entitled the plaintiff to a decree of divorce *a vinculo;* that prior to the institution of this action the plaintiff had separated from her husband, the said C. W. Osenton, and had gone to the State of Virginia with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States Court; that prior to the institution of this action this plaintiff had instituted in the Circuit Court of the County of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce from the matrimony aforesaid has heretofore been granted her by decree of said Circuit Court, and these facts are admitted for the purpose of this plea only.'

"The plea was overruled and the defendant pleaded to the merits. There was a verdict and judgment for the plaintiff for $35,000. A motion was made to set aside the verdict and grant a new trial, which was overruled, and the cause comes to this court upon a writ of error; the assignment of errors raising, among other things, the question of the jurisdiction of the District Court for the Southern District of West Virginia.

"QUESTION.

"Was the plaintiff, upon the foregoing statement of facts, such a citizen and resident of the State of Virginia, at the time of the commencement of this action, as to entitle her to bring and maintain the same in the District Court of the United States for the Southern District of West Virginia"

ARGUMENT.

The question presented here is whether the defendant in error was at the time of the institution of this action a citizen and

resident of the State of Virginia such as to entitle her to maintain an action in the Federal Court against a citizen and resident of West Virginia. In the agreed statement of facts it appears that her husband had committed a violation of marital duty such as entitled her to a divorce, that she had instituted a suit for such divorce before the institution of the present action; that an absolute divorce had afterwards been granted her; that she had gone to Virginia with the intention of making her home in that state for an indefinite time in order that she might institute the present action in a court of the United States. The question here presented involves two other questions:

(1) The capacity of the defendant in error to acquire a domicile in Virginia, and (2), whether she had, in fact, done so.

1. We believe there can be no doubt that where the husband has committed a violation of marital duty which entitles the wife to a divorce, she then has the right to establish for herself a separate domicile giving her the right of maintaining a suit in the Federal District Court for alienation of affections.

Under the common law cases the rule is that the wife cannot establish a separate domicile for herself. But even at common law, in its strictest days, the rule was not an invariable formula, but admitted of qualifications and exceptions. The rule that the domicile follows that of the husband was based upon the legal unity of the two. This legal unity was not an inflexible or irrefragible bond even in the mind of Coke and other champions of logical uniformity. For instance, if the husband and wife are one and the wife's legal being is at all times sunk into that of the husband she could not sue or be sued alone, yet there were well recognized exceptions to the rule that her husband must be joined with her in all actions. If the husband had abjured the realm, was an alien enemy, had been banished or transported for felony, the wife could sue and be sued as a *feme sole*. True, these exceptions admitted of statement in scholastic language so that a formal adherence to the rule was preserved. In such cases the husband was said to be civilly dead. But this was only attempting to save one fiction by the use of another. He was not civilly dead as to the wife. Neither abjuration of the realm, banishment, hostile alienage or transportation operated as a divorcement of the wife. None

of them gave her any right to remarry. The substance of these exceptions was that the law recognized the necessity of the situation, and when the responsibilities, which properly and normally belonging to the husband were cast upon the wife, then the law did not hold tight the bonds of a relation which had become only a burden.

In course of time we see that other exceptions began to gain ground, which were not susceptible of statement consistent with the scholastic and logical uniformity which has been supposed to belong to the rule, and to which the exceptions above mentioned were reduced.

At common law the husband exercised the privilege of excluding testimony of the wife hostile to himself. And if the fiction of identity of husband and wife had always been logically adhered to he would have enjoyed the privilege, no matter who might be the parties involved. Yet such was not the case. Where he had committed an offense against the wife the testimony of the latter was admitted against him. Cooley's *Blackstone* 443; 4 *Wig. Ev.*, Section 2239, pages 3056 *et seq.* The unity of husband and wife was not insisted on in the face of this practical demonstration of their duality. This is but another instance where the logic of the fiction was made to yield to the necessities of the case, that the law might not perpetrate injustice by an iron clad adherence to a figment of its own creation.

In *Ringstead* vs. *Lady Lanesborough*, 3 Doug. 197, decided in the year 1783, it appeared that the defendant had made a promise while residing in Ireland, her husband then living in England, separate from his wife, under deed of separation between the two. After the death of Lord Lanesborough she was sued upon this promise made while he was living. The Court of King's Bench held that coverture was no defense. In *Corbett* vs. *Polnitz*, 1 T. R. 4, 7, 8 the Court of King's Bench (1786), held that a wife living apart and having a separate maintenance might be sued alone. Lord Chief Justice Mansfield said:

> "The facts lie in a very narrow compass and admit of no doubt. Lord and Lady Percy, by a deed, mutually agree to live separate; neither can break this agreement; and a large maintenance is settled on her for

her own private separate use as a *feme sole* to all purposes, the same as if she were unmarried. The claim upon which this action was founded is of a most meritorious nature. Lady Percy applied to the plaintiff: he considered her as a *feme sole*, and became surety for her: she promised to indemnify him, and the contract was concluded under a firm belief on both sides that it was perfectly valid and binding. In justice then she ought to pay this debt. But then to encounter this, is a rule of positive law, which is to be adhered and preferred, though in some particular cases it may seem productive of hardship and oppression. By this general rule, a married woman can have no property real or personal. Her contracts are entirely and universally void; for her contracts even if necessary are the contracts of her husband: she can not be sued or be taken in execution. This is the general rule. But then it has been properly said, that as the times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule."

Lord Loughborough, in *Compton* vs. *Collison*, 1. H. Bl. 334, 349, in Common Pleas, in 1790, considers the law not entirely settled, but inclines to the opinion that a wife, living apart under articles of separation might sue and be sued alone. It was decided in that case that a married woman, under such circumstances, might surrender a copy hold estate without the concurrence of her husband. In *DeGallion* vs. *L'Aigle*, Bos. & Pull. 357, 359, decided in the year 1798, Judges Buller and Heath held, that a promise by a married woman, acting as sole trader, was binding, she living apart from her husband and he being at the time of promise in a foreign country. Buller says the case is like those of exile or banishment, where the husband is civilly dead.

Under the conservative influence of Lord Chief Justice Kenyon, whose habits of thought were directly contrary to those of Mansfield, the liberal tendency toward married women received a temporary check. In *Marshall* vs. *Rutton*, 8 T. Rep. 545 the Court of King's Bench, presided over by Lord Chief Justice Kenyon, held that a wife living separate from her husband could not contract and be sued as a *feme sole*. In *Lewis* vs.

Lee, 3. B. & C. 291, in the year 1800, the same was held even as to a woman divorced *a mensa et thoro*. But the check was only temporary, and as might have been anticipated the more liberal opinions of the great Mansfield continued to gain ground.

In *Carroll* vs. *Blencow*, 4 Esp. 27, decided in the year 1801, Lord *Alvaney*, the next year after the decision in *Marshall* vs. *Rutton*, held at *nisi prius* that the wife might sue alone where her husband had been transported for seven years even though his sentence had expired, if he had not returned to England. *Tobey* vs. *Lindsey*, 1 Dow. 131, 138, decided in the House of Lords in the year 1813, was an action for divorce instituted by a Scotchman against his wife, who was resident in England, living apart under a deed of separation. Lord Chancellor Eldon and Lord Redesdale both appear to be of the opinion that in such a case the domicile of the wife was not that of her husband, and that the Scotch Court had no jurisdiction. The cause was remitted to the Scotch Court for a review of all matters.

Recent utterances of English judges show that the courts of that country could not be induced by any argument to enforce in its supposed ancient strictness the fiction of the unity of husband and wife.

In *Dolphin* vs. *Robins*, 7 H. L. C. 390, it appeared that a wife had left her husband and gone to reside in a different country. Both committed adultery. The question arose as to whether a will executed in France, the place of her residence, was valid. It was if she was domiciled in France, otherwise not. The House of Lords held she could not acquire a separate domicile. But Lord Cranworth said:

> "I have already observed that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I shall add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary excep-

tions. I advert to them only to show, that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say, that in the appeal now before the House no such case of exception is to be founded."

LaSuer vs. *LaSuer*, L. R. 1 P. D. 139 (1876) was a suit for divorce brought by the wife in England. The parties had been married and had been in Jersey, where the husband deserted the wife and went to America. The question arose whether the Court had jurisdiction. It was decided that it had not, as it could not compel the husband to be amenable to the *lex fori* Sir. R. J. Phillimore said:

"The second and really important question in the case is whether the domicile of the wife in England (for I think it may be assumed that her *bona fide* domicile, so far as the law allows her to establish one, is in this country) has founded the jurisdiction of this court in a suit for divorce *a vinculo* against her husband. It may well be that for other purposes than this, for matters affecting herself alone, the desertion by her husband, which must be considered as a proved fact in this case, has rendered it competent for her to establish a domicile of her own. I am not aware that any judicial decision has yet gone to this length, but there is much to be said in favor of the proposition both on principle and analogy, and it receives some support from the dicta of Lord Cranworth in the case of *Dolphin* vs. *Robins*. (1) First, he considered the effect of a decree *a mensa et thoro*. 'It may be,' he says, 'that where there has been a judicial proceeding enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture.' This doctrine, I may observe, is supported by the case, *Williams* vs. *Dormer*. (2) 'I should add,' Lord Cranworth then continues, 'that there may be exceptional cases, to which even without judicial separation the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted the wife, and established himself permanently in a foreign country, or has committed felony, and been transported. It may be that in these and similar instances, the nature of the case may be considered to give

> rise to necessary exceptions. I advert to them only to show that the able argument of Sir H. Cairns has not been lost sight of. It is sufficient to say that in the appeal now before the House no such case of exception is to be found.' These words were uttered in 1859. The doctrine that the domicile of the wife is necessarily that of the husband must surely admit of some exceptions, such as those referred to by Lord Cranworth. It is founded, indeed, upon the duty of the wife to live with her husband, but also upon the presumption that he will be faithful to his marriage vow. If he disregard that obligation, if he commits an offense which entitles her either to judicial separation or a divorce, her legal duty to live with him must undergo considerable modification, and in some cases entirely cease, and it is possible that her continued cohabitation with him might disentitle her to the relief to which his misconduct uncondoned had entitled her. The Courts of the United States of North America seem to have laid down these positions, first, that the wife may have a domicile distinct from that of her husband, and, secondly, that the courts of the *bona fide* domicile of either party may entertain a suit for divorce. The Scotch courts have holden that a permanent domicile is not necessary to found the jurisdiction in a suit for divorce brought by either party, but that the *delictum* of adultery must have been committed in Scotland. Upon the whole I am disposed to assume, in favor of the petitioner, the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicile for herself, and in coming to that conclusion I am aware that I am going a step further than judicial decisions have yet gone."

In America at an early day it was recognized that the unity of husband and wife was a mere fiction to be adhered to in ordinary cases, but to be freely departed from whenever the cause of justice in any way demanded it. This court in the year 1818, in *Rhea* vs. *Rhenner*, 1 Pet. 105, 107, held that a married woman, abandoned by her husband, might contract as a *feme sole*. The court said:

> "The law seems to be settled, that, when the wife is left without maintenance or support by the husband, has traded as a *feme sole*, and has obtained credit as

such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme* covert, that she should be answerable for her debts, and liable to an action in such a case; otherwise, she could not obtain credit, and would have no means of gaining a livelihood."

In *Gregory* vs. *Paul*, 15 Mass. 31, a woman whose husband was an alien, who had never lived in Massachusetts, and had deserted her, was allowed to sue as a *feme sole*. The Court in its opinion gives an able review of the cases, showing the state of the law at that time. "A wife deserted by her husband may be sued alone." *Clark* vs. *Valentino*, 41 Ga. 143; *Barber* vs. *Barber*, 21 How. 582, 589. A married woman, living separate from her husband, he being an alien, may contract and be sued as a *feme sole*. *McArthur* vs. *Bloom*, 2 Duer 151, (Superior Court of City of New York, 1853). A wife compelled to leave her home by the cruelty of her husband, who has gone to another state, may sue as *feme sole*. *Abbott* vs. *Bayley*, 6 Pick. 89 (1827).

The whole course of policy, legislation and judicial decision in recent times has been wholly away from any ancient strictness. We believe that it can be safely asserted that according to the weight of modern authority in America, the wife has, upon the commission by her husband of an offense entitling her to a divorce, an undoubted right to leave him and establish a domicile for herself for all purposes, certainly for all purposes which are requisite or proper for the protection of any of her rights. The old common law rule may be regarded as based on several reasons: (a) the artificial fiction of the law, which regarded them as one; (b) the duty of the husband to provide a home and maintenance, which drew after it the right to establish that home and to decide where he would furnish the maintenance which he was obliged to give; (c) upon a presumption of fact that as the wife does, in all normal cases, have her home and domicile at the same place as the husband, then what is ordinarily true will be presumed to be so. These are all the reasons which we have ever heard put forward as the basis of the rule that the domicile of the wife is that of the husband.

As to (a) the artificial fiction of identity of husband and wife, this has been largely modified by modern statutes, removing the disabilities and enlarging the rights of married women.

The legislation of West Virginia and Virginia well illustrates the modern spirit toward married women. By the law of West Virginia the real and personal property owned by the wife at the time of her marriage, or thereafter acquired, may be held by her as her sole and separate property, free from the control or debts of her husband. *W. Va. Code, 1906,* Ch. 66, Sections 1, 2 and 3. The earnings of married women and properly purchased with such earnings are separate property. *Id.* Sec. 12. Property held in trust for her may, by the appropriate court, be committed to her sole management. *Id.* Sec. 4. She may be a stockholder, director or other officer of a corporation. *Id.* Sec. 9. If she lives separate and apart from her husband, she may carry on business in her own name. *Id.* Sec. 14. She may be sued without joining her husband, where the action concerns her separate property, or where the action is between herself and her husband, or where she is living separate and apart from her husband. And in no case need she prosecute or defend by guardian or next friend. *Id.* Sec. 13. She may sue at law or in equity as if she was a *feme sole. Id.* Sec. 16. She may or may not join her husband as co-plaintiff in an action for personal injury to herself. *Normile* vs. *Wheeling Traction Company* 57 W. Va 132, 135.

In Virginia a married woman may acquire and hold property, contract, sue and be sued in all respects as fully as though she were unmarried. 1 *Pol. Virginia Code, 1904,* Section 2286a. Her husband is not liable for her contracts or torts entered into or committed either before or after marriage, *Id.* l. c. It is error to join her husband as a co-plaintiff in a suit to recover for personal injuries to the wife. *Norfolk, etc. R. R. Co.* vs *Dougherty,* 92 Va. 372; *Richmond Railway etc. Co.* vs. *Bowles,* 92 Va. 738. In a suit against a married woman to recover on a promissory note made by her, it is unnecessary to allege that the contract was made with reference to her separate estate, as this is irrelevant. *Young* vs. *Hart,* 101 Va. 480.

The spirit of the times has been in the same direction. And judicial decision, responding to the expression of public policy

through the legislature and in the social customs and habits of the people, has likewise further modified the rigor of this rule, which was always largely technical, and if adhered to in modern times, at least in cases where the whole household was broken up and husband and wife separated, would be wholly so, and capable of working the greatest injustice. Therefore this reason is not to be allowed to stand in the way of justice unless the state of the law imperatively requires it.

As to (b) the duty of the husband to establish a home, and his corresponding right to choose a place for it, it is readily seen that this reason wholly fails when the husband violates his marital duty and makes the place where he lives no longer a fit habitation for the wife. Having violated the duty, his corresponding right ceases.

In *Dutcher* vs. *Dutcher*, 39 Wis. 651 the question arose whether in a suit by the husband for divorce, the wife was domiciled in the same state as the husband so as to give the court jurisdiction. The court said (p. 659):

> "Doubtless for certain purposes the domicile of the husband is the domicile of the wife. This rule, however, goes upon the unity of the wife, and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domiciles of husband and wife. If that rule were to be applied to cases of desertion, it would imply something like an absurdity. The weight of authority is against the application of the rule, as applied to cases of divorce, when the parties are actually living in different jurisdictions."

The court said in *Derby* vs. *Derby*, 14 Ill. App. 645, 647:

> "It is a familiar and well recognized rule of law, that marriage creates a unity of the parties which gives them one domicile, and as the husband has the authority to determine where that domicile shall be, the wife's domicile as a consequence follows that of her husband. This rule, though artificial and founded upon the theoretic identity of the persons and interests of husband and wife, is doubtless of the highest importance to society, in that upon it rests to a great degree the unity and integrity of families and homes. But while it

> should therefore be jealously adhered to and enforced wherever it properly applies, we are fully authorized by both reason and authority in applying to it the maxim that where the reason of the rule ceases, the rule itself ceases."

So far as (c) the presumption based upon ordinary experience that the domicile of the husband is that of the wife, we can see that this consideration can not stand when there has been an actual separation by the establishment of residence in different places. A presumption can not stand in the face of proof.

The rule that the domicile of the husband is that of the wife has long ceased to be absolute; for no American court any longer denies that the wife may establish a separate domicile for purposes of divorce. *Haddock* vs. *Haddock*, 201 U. S. 562. This is so well settled that we do not regard it as necessary to cite any extensive authority in support of it.

But the right of a wife to establish a separate domicile is by no means, as has been sometimes supposed, confined to proceedings for obtaining a divorce. The present Chief Justice, in *Haddock* vs. *Haddock*, 201 U. S. 562, 570, 571, 572, lays down the following as settled:

> "Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not in the nature of things, become a new domicile of the wife; hence, the place where the wife was so domiciled when so abandoned constitutes her legal domicile until a new actual domicile be by her elsewhere acquired. This was clearly expressed in *Barber* vs. *Barber*, 21 How. 582, where it was said (p. 595): 'The general rule is, that a voluntary separation will not give to the wife a different domicilation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority

> over her which alone makes his domicile hers.' And the same doctrine was expressly upheld in *Cheever* vs. *Wilson, supra*, where the court said (9 Wall. 123: 'It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's and that she can not have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. *The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so.* The right springs from the necessity for its exercise, and endures as long as the necessity continues.'"

It will be observed that this Court has more than once laid down the rule that the right of the wife to establish a separate domicile exists "whenever it is necessary or proper that she should do so." Now the question arises: What is the kind of necessity or propriety which the courts recognize as entitling the wife to establish a separate domicile? It may be urged that the necessity or propriety would be confined to that class of cases where the wife could not obtain the desired relief without the right to establish this separate domicile, but this is by no means the case. Even in divorce cases it is never absolutely necessary that the wife acquire any separate domicile of her own whatever. It is well recognized doctrine that if the wife is deserted by her husband, who goes off and establishes a domicile in another state, then she need not follow him or go into any other state whatever, but can remain where she is, and enough of the old domicile will cling to her and enough of the matrimonial *res* will remain in that state for the court to give her a valid decree of divorce, entitled to full faith and credit in every state of the Union. That was the ground upon which this Court in the *Haddock* case distinguished the case of *Atherton* vs. *Atherton*. Mr. Justice White, in *Haddock* vs. *Haddock*, 201 U. S. 562, 571, 572, says:

> "Seventh. So also is it settled that where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having the jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state

> of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause. *Atherton* vs. *Atherton*, 181 U. S. 155."

Now, since we see that a wife can always obtain a divorce without acquiring a new domicile, there is no absolute necessity that she should acquire such domicile for the purpose of divorce. Yet it is universally recognized that she may do so. Then it follows that the propriety or necessity which will enable her to acquire a new domicile is not an absolute necessity; it is not required to be such a necessity as that without the acquirement of the new domicile she could not obtain the relief which she is asking. We find from the cases that she may obtain the relief which she asks, that is, the divorce, without acquiring any new domicile, but merely by retaining the old. Therefore the necessity or propriety recognized by this Court is not of that stringent character that without the acquirement of the new domicile she would be barred of her relief, for, as we have seen, she may, under the law, in all cases obtain the decree of divorce without exercising the right to acquire a separate domicile. Then, having shown that the necessity or propriety justifying the acquisition of a new domicile is not that this is her exclusive means of obtaining the relief, it becomes necessary to inquire what is the test to which she is subjected before being allowed to exercise the right of acquisition of a separate domicile; and we lay it down without doubt that the necessity or propriety is only the following: that in any suit or proceeding which the wife may institute for the protection of her rights, if it is necessary in order for the particular court to give her relief, that the general rule of the wife's domicile following that of her husband be disregarded, then it will be disregarded. When we consider the hundreds, even thousands, of divorces which have been granted in this country wherein the rule was disregarded and the wife held to acquire a new domicile, when at the same time she could have obtained the same relief in the courts of another state without acquiring any separate domicile, it is readily seen that the above test is the only one imposed.

Now, in the present case it may be argued that it is not necessary, in order to protect the wife's rights, that she should sue in the Federal court. She may sue in the State court, it may be said. True, but it could likewise have been said in the many cases to which we have called attention that the wife need not sue for divorce in that particular state, but could go to some other state and there obtain everything which the court she first sought could give her. And the argument would have been as valid there as here. But we find that the practice of the courts has not been to send her around at inconvenience from one state or from one court to another, but their practice has been that whenever the wife came into any particular court demanding the protection of her rights, then if it became necessary in order for the court to grant relief, to disregard the fiction of identity of domicile, then the court would unhesitatingly do so. Thus the principle which gives the wife a right to establish a separate domicile for purposes of divorce would likewise give her the right to bring any other suit which should be necessary or proper for the protection of her interests.

Not only does reason sanction this, but it will be found that the great weight of American authority confirms it, and in the following pages we have cited a number of decisions and the language of the courts in passing thereon, which establish, as we think, clearly, the right of the plaintiff to maintain her action in the Federal court.

In *Matter of Florance,* 54 Hun. 328, 330, 331 the question arose as to the domicile of a married woman at the time of her death and depending thereon the disposition of her property. *Van Brunt,* P. J. said:

> "The petitioner claims that as no legal separation had taken place between them, although they had lived apart for twelve years, the residence of his wife was that of her husband, viz: Pennsylvania, and that, by the laws of said State, he was entitled to share in her estate, which would not be the case were she a resident of New York.
>
> "The whole claim of the plaintiff is based upon the old rule that a woman by marriage asquires the domicile of her husband and changes it with him. It is admitted that the wife may procure a separate domicile

for purposes of divorce, but it seems to be claimed that such domicile can not be procured for any other purpose. The old rule in reference to a married woman's domicile cannot, certainly, prevail in view of the rights which are recognized to be hers by statutes.

"The property relations between husband and wife have been entirely changed since the rule in question has obtained, and the reasons for the rule no longer exist. The wife is now a distinct entity, having in the disposition of her property all the rights, and even more than a husband ever possessed, and the husband has no control whatever over her movements or her disposition of her property. In the case at bar it appears that in 1875 the petitioner and his wife agreed to separate, she to take their children and maintain them. They did separate, he going to Philadelphia and she living in New York, which had been her home before marriage, and supporting their children from her own means. There is no pretense that the petitioner ever contributed one cent to the support of his wife or their children since 1875, or offered to do so, and the best he can say in his petition is that he never refused to provide a home for his wife or her children in the city of Philadelphia. Probably he was never asked to do so, and, consequently, did not refuse, but he nowhere alleges that he offered to provide a home for his wife and children anywhere, and probably did not.

"They had agreed to live separately, and she had agreed to support herself and her children. She then, by and with his consent, acquired a domicile in New York, made that her home and that of her children, and certainly if she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children and to be protected from the claims of a husband with whom she had not lived for twelve years, and who has not, during that time, either contributed or offered to contribute to her support or to that of their children and who desires now, under legal fiction, to take away from his own children a portion of their mother's inheritance."

In *Prater* vs. *Prater*, 87 Tenn. 78 a wife who had abandoned her husband and taken up her residence in another state was held not entitled to a homestead, as she was not a citizen of the state. The Court said (pp. 83-84):

"We concede that, as a general rule, the domicile of the husband is, in contemplation of law, the domicile of the wife; but, of necessity, there are many exceptions to that rule. This case furnishes a striking exception, and forcibly illustrates the injustice that would flow from a universal application of the rule.

"No effect was given to this rule in the Emmett case, just mentioned. In fact it was not referred to at all in that case, but the real residence of the wife was treated as controlling. So we treat it in this case.

"With respect to the unity of domicile as bearing upon the homestead right, Judge Thompson says:

" 'But, as the domicile of the husband draws with it the domicile of the wife, the fact that a wife remains out of the state with the consent and approval of her husband has been held not to preclude her, after his death, from asserting a homestead right in his estate as against his creditors. But it is otherwise if the absence was voluntary on the part of the wife, amounting to a wrongful abandonment of her husband.'

"Thompson H. and E., Sec. 91, citing *Lacey* vs. *Clements,* 38 Texas 661, and *Earl* vs. *Earl,* 9 Texas 643.

"It has also been held that a wife is not entitled to homestead in the lands of her husband, acquired in another state by him after deserting her and their children, she never having resided in the latter state. *Stanton* vs. *Hitchcock* (Mich.), 31 N. W. R. 395."

In *Re Colebrook*, 55 N. Y. Supp. 861, the Supreme Court held in a habeas corpus proceeding that the domicile of the wife may be different from that of the husband. The court said (p. 864):

"The rule is that the domicile of the husband is *prima facie* that of the wife, because the home of the husband is that of the wife, and it is her duty to go with him where he goes, and dwell with him where he dwells. There are exceptions to this rule, however, one of which is that, whenever the conduct of the husband is such as to entitle the wife to an absolute or limited divorce, she may, if necessary, acquire a separate domicile. *Hunt* vs. *Hunt*, 72 N. Y. 218; *O'Dea* vs. *O'Dea*, 101 N. Y. 37, 4 N. E. 110. If her statements made under oath in the North Dakota divorce suit are true, she was justified in leaving the home of her husband, and acquiring a domicile somewhere else. It seems to

me that there is no escape from the conclusion that the writ of *habeas corpus* issued herein is void for want of jurisdiction."

In *Bucholz* vs. *Bucholz,* 115 Pac. 88, involving the question of a proper venue of a probate proceeding, the Supreme Court of Washington said (p. 89):

> "His duty to maintain and support the family and his right to establish the domicile are correlative."

The Court further said (p. 90):

> "Where the husband has deserted the wife, or where there has been a mutual abandonment of the marriage relation so that every purpose of marriage is destroyed, the reason for the rule that the husband can fix the family domicile ceases, and the rule ceases, and the wife is then at liberty to establish a separate domicile for all purposes. *Gordon* vs. *Yost* (C. C.), 140 Fed. 79; *Town of Watertown* vs. *Greaves,* 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865; *Shute* vs. *Sargent,* 67 N. H. 305, 36 Atl. 282; In *re Florance's Will,* 54 Hun. 328, 7 N. Y. Supp. 578; 84 *Am. St. Rep.* note 8, pp. 33, 34. In the Gordon case it was held that, where the husband has deserted the wife, she may be a resident and citizen of a different state from her husband for the purpose of prosecuting a suit in a Federal court to recover for the alienation of his affections and causing his desertion. In the Town of Watertown case an undivorced married woman was permitted to sue in a Federal court, in an action of tort, for the recovery of damages for injuries caused by a defective sidewalk. The contention that she could only establish a quasi domicile apart from the domicile of her husband for the purpose of divorce was rejected. In considering the limitations of the rule that the domicile of the wife follows that of her husband, the court said: 'If the husband abandons their domicile and his wife, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers.' In the Shute case the wife was an actual resident of the State of New Hampshire at the date of her death. The husband retained a domicile in Massachusetts, but had abandoned his wife before she left that state. It was held that the wife was an actual resident of the State of New Hamp-

shire at the time of her death. The court said that, in view of the modern legislation, 'no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law.' In *re Florance's Will*, it is said: '* * * If she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children, and to be protected from the claim of a husband with whom she has not lived for twelve years.'

"The word 'Domicile,' as applied to the marriage relation, means a home where the husband and wife dwell together in amity. Whilst we think that the husband, notwithstanding the liberal provisions of our statute has the right under normal conditions to fix the family domicile, there is no sound principle of law which forbids the wife, when the essence of the marriage relation has been dstroyed, from establishing a separate domicile for every purpose."

Mr. Justice White, in *Haddock* vs. *Haddock*, 201 U. S. 562, 579, cites with apparent approval the holding of the Massachusetts Court in which the right of the wife to a separate domicile from that of her husband is recognized and enforced in an action for restraint of personal interference and separate maintenance, a case which shows that the right of the wife to a separate domicile is by no means confined to proceedings of divorce. The learned Justice said:

"The distinction was clearly pointed out in *Blackinton* vs. *Blackinton*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicile in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicile of the husband was not the domicile of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and suit was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extra-territorial force. But this circum-

stance was held not to be controlling, and the decree was awarded."

"The rule in now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and, when husband and wife have separated and agreed to live apart, the wife's domicile can not be drawn to that of her husband without her consent, or without her actual presence at his place of residence." *Rundle* vs. *Van-Immegan*, 9 Civ. Proc. R. 328.

Saperstone vs. *Saperstone*, 131 N. Y. Supp. 241, was an action to determine the validity of the second marriage of a Russian woman who had gone to live in America as her home, while her husband remained in Russia. After her removal to America, her husband being still domiciled in Russia, she obtained a Russian divorce and thereafter contracted her second marriage. It was held that the Russian divorce was void for the reason that she was domiciled in America at the time it was granted. In *White* vs. *White*, 18 R. I. 292, the court dismissed the petition of a wife for divorce upon the ground that the court had no jurisdiction, the petitioner not being domiciled in Rhode Island. The husband and wife had been domiciled in Rhode Island, but upon desertion by the husband the wife returned to her original home in Massachusetts, in which state the court held her to be domiciled at the time she filed her petition.

In *Shute* vs. *Sargent*, 67 N. H. 305, 306 it appeared that the husband had abandoned his wife in Massachusetts and she removed to New Hampshire, the husband retaining his domicile in the former State. It was held that the wife was domiciled in New Hampshire so that probate was properly granted there. The Court said:

"But the common-law theory of marriage has largely ceased to obtain everywhere, and especially in this State, where the law has long recognized the wife as having a separate existence, separate rights, and separate interests. In respect to the duties and obligations which arise from the contract of marriage and constitute its object, husband and wife are still, and must continue to be, a legal unit; but so completely has the ancient unity become dissevered and the theory of the wife's servitude superseded by the theory of equality

which has been established by the legislation and adjudications of the last half century, that she now stands, almost without an exception, upon an equality with the husband as to property, torts, contracts, and civil rights. Pub. Sts., c. 176; Ib., c. 90, s. 9; *Seaver* vs. *Adams*, 66 N. H. 142, 143, and authorities cited. And since the law puts her upon an equality so that he now has no more power and authority over her than she has over him, no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law. If, however, there are exceptional cases, when for certain purposes it might be held otherwise, there can be in this jurisdiction no reason for holding that when the husband has forfeited his marital rights by his misbehavior, the wife may not acquire a separate domicile and exercise the appertaining rights and duties of citizenship with which married women have become invested. To hold otherwise would not only break the line of consistency and progress which has been steadily advanced until the ancient legal distinctions between the sexes, which were adapted to a condition that has ceased to exist and can never return, have been largely swept away, but it would also be subversive of the statutory right of voting and being elected to office in educational matters which wives now possess (Pub. Sts. c. 90, ss. 9, 14) inasmuch as it would compel the innocent wife to reside and make her home in whatever voting precinct the offending husband might choose to fix his domicile, or to suffer the deprivation of the elective franchise; and if he should remove his domicile to another State and she should remain here, the exercise of all her rights dependent upon domicile would be similarly affected.

"This can not be the law. On the contrary, the good sense of the thing is, that a wife can not be divested of the right of suffrage, or be deprived of any civil or legal right, by the act of her husband; and so we take the law to be. Whenever it is necessary or proper for her to acquire a separate domicile, she may do so. This is the rule for the purpose of divorce. (*Payson* vs. *Payson*, 34 N. H. 518; *Cheever* vs. *Wilson*, 9 Wall. 108, 124; *Ditson* vs. *Ditson*, 4 R. I. 87, 107; *Harding* vs. *Alden*, 9 Greenl. 140), and it is the true rule for all purposes."

Gordon vs. *Yost*, 140 Fed. 79, 80, 81, decided by the District Judge in the Northern District of West Virginia, was an action

by a wife to recover damages for alienation of her husband's affections. She had been deserted by her husband and had gone into another state, the husband remaining in the state of original domicile. It was contended by the defense that she had not acquired any separate domicile such as entitled her to sue in the Federal court. This contention was overruled by Judge Dayton, who said:

> "The single question raised by the plea is that the plaintiff, being a married woman, can have no other domicile and be a citizen of no other state except that of her husband. Therefore, her husband being a resident of West Virginia, she must be considered as a resident of that State, no matter where she may be.
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> "I frankly confess that, while my sympathies were all against the proposition, especially in a case of this kind, yet my judgment at first was that it was legally sound and must be enforced. A careful study of the matter has convinced me such judgment was erroneous. The case of *Minor* vs. *Happersett*, 21 Wall. 162, 22 L. Ed. 627, has distinctly decided that a woman was a 'citizen' not only after, but before the passage of the Fourteenth Amendment, although not, under State law, entitled to vote.
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> "It is unquestionably true, as a general proposition of common law, that where she marries she merges her legal identity in her husband's. The very essence of the marriage vow places upon him the obligation to support and maintain her. That he may do so he may go from one place to another, from one home to another, and her obligation is to follow. Her home or domicile, under ordinary circumstances, therefore, is his, and must be his, in a relation where each have solemnly pledged themselves to cleave, one to the other, until death shall part them, and the law requires the husband to be the provider, the supporting power.
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> "The foundation of the rule is based upon this principle of the home as established by the husband, cared for by the wife, where they two shall dwell together. The fact that the vast majority of husbands and wives are true to their vows, to establish such domicile, and to perform the mutual obligations, the one to the other, establishes the general rule of the law, for the law assumes that to be true which is true in the great majority of cases. But we must remember that 'law is beneficence acting by rule,' and hence it is found, in

very many instances, that abnormal conditions must be governed by exceptions to, and not the general rule itself, in order that such beneficence may work good, and not evil.

"Let us suppose one of those abnormal conditions. Here is a home established legally and under the general rule, wherein the husband and wife are discharging their marital obligations one to the other, and living in peace and happiness. A wicked, vicious woman, with physical charms and large means it may be, determines to break up that home and succeeds. She persuades the husband to break his obligations, violate the laws of God and man, leave the wife destitute, and go to another State to live in adultery with her. Could anything be more inhuman or cruel than to say that the wife can have no other home, no other domicile, than the foul abode of these two who have so deeply wronged her? It may be said that she may secure a divorce from her husband. Yes; but she may not desire to do so. She may be willing to condone, forgive. Shall she not be permitted under the law to establish, under such conditions, a domicile wherever she can, where she may still maintain her virtue and secure a subsistence for herself, and, it may be, for helpless children abandoned with her by the faithless husband? I think so, and I am glad to find that the courts have so held."

In *Watertown* vs. *Greaves*, 50 C. C. A. 172, the plaintiff had been married and was domiciled with her husband in the State of Massachusetts. Her husband deserted her and she later went to the State of Rhode Island, where her husband had no domicile. She then sued in the Federal court to recover damages for personal injuries alleged to have been inflicted by the municipality of Watertown, the only ground of jurisdiction being that she was a citizen of Rhode Island and the municipality a citizen of Massachusetts. Her right to sue was sustained by the Circuit Court and the case was carried to the Court of Appeals for the first circuit. Brown, District Judge, delivering the opinion of the Court, said:

"The defendant, now plaintiff in error, contends that the proposition that the exception made in divorce cases to the common law rule as to the domicile of the wife following that of the husband does not extend to proceedings other than a suit for divorce was expressly

declared by the Supreme Court in *Barber* vs. *Barber*, 21 How. 528. We do not so read this opinion. The point there involved was whether a woman who had been divorced *a mensa et thoro* might establish an independent domicile. It was decided that she could. It was neither decided nor intimated in the opinion that an independent domicile could not be acquired without a judicial decree. The court, seems, however, to have recognized the following principles: The rule that the domicile of the wife is that of the husband is probably found to rest upon the legal duty of the wife to follow and dwell with the husband wherever he goes. That, upon the commission of an offense which entitles her to have the marriage dissolved, she is discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him. That if the husband abandons their domicile and his wife, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone make his domicile hers. * * * * *

"The question whether the wife, in order to bring suit as a citizen of another state from that in which her husband is domiciled, must establish her right to acquire a separate domicile by the judgment of a proper tribunal in direct proceeding for that purpose, is one that presents difficulties. It may be said that there are practical difficulties in trying collaterally the relations of husband and wife, and in determining whether or not the husband has been guilty of such a *delictum* as justifies a separate domicile. But similar difficulties do not preclude a husband from asserting, in defense of an action for supplies furnished to a wife, the adultery or other misconduct of the wife. Such cases involve a collateral inquiry into the rights of husband and wife arising from a breach of the obligations of marriage, yet it has never been held that the husband must establish the fact of the wife's *delictum* in a direct proceeding for that purpose. *Gill* vs. *Reed*, 5 R. I. 343, 73 Am. Dec. 73. The wife may not desire a divorce *a vinculo* or *a mensa et thoro;* she may be ready to condone the fault of the husband in case he shall return; she may desire, for her own sake or that of her family, to avoid publicity; or she may die before she has established her rights by a judicial decree. The difficulties that might arise from adopting a rigid rule that the

wife's domicile shall be presumed to be her husband's until she overcomes this presumption by a judicial decree seem more serious than those that would arise from trying domestic relations collaterally. We should hesitate long before deciding that the only exception to the rule that the domicile of the wife follows that of her husband is in judicial proceedings whose express object is to show that the relation itself ought to be dissolved or modified, since there is grave danger that serious injustice might arise. See *LeSuer* vs. *LeSuer*, L. R. 1 Prob. Div. 139- 142; *Eversley, Dom. Rel.* (1896) p. 167. 2 *Bish. Mar. & Div.* Secs. 114, 115, upon which counsel for the town relies, seems to recognize that the rule should not always prevail in non-divorce cases. Furthermore, upon principle, it is difficult to see why a wife who is completely abandoned by her husband, even in consequence of her own fault, should be precluded from establishing an independent domicile. If the husband, justifiably or unjustifiably, renders it impossible for her to dwell with him, and voluntarily relinquishes altogether his marital control and protection, so that the abandonment is a completed fact, it can not be said, in strictness, that her dwelling apart from him is her continuous fault. Her original fault may have justified the abandonment, but his renunciation of his former obligations keeps her from his home, and if she must find for herself another home, and from necessity or convenience goes to another state, it is difficult to see why she should be precluded from the ordinary rights of a citizen of that state."

The editor of *Wharton* says (Conflict of Laws, Sec. 46, pp. 105, 106, 107):

"The modern American doctrine, in harmony with the extension of the rights of married women generally, appears to be that the wife's domicile adheres to the husband's only so long as the marriage relation remains undisturbed. The mere fact that the wife, as a matter of convenience, resides in a state or country other than the domicile of the husband does not disturb the unity of the marriage relation in this sense, nor enable the wife to acquire a separate domicile, if they have not assumed divorce relations towards each other nor separated as man and wife, and neither has abandoned or deserted the other. When, however, the unity of the marriage relation is disturbed by a definite, though vol-

untary, separation as man and wife, the wife's domicile no longer adheres to the husband's, and each may acquire a new and separate domicile, not only for the purpose of divorce, but for all purposes dependent upon domicile; at least, if she was justified by her husband's misconduct in leaving him. The right of the wife to acquire a separate domicile is often stated with the qualification that the separation must have been due to the husband's fault, but there seems to be a tendency toward the position that the separation itself, when it amounts to a disturbance of the unity of the marriage relation, severs the unity of the domicile, without reference to the question which party was at fault. That seems the only practical position, at least, when the question of the wife's domicile arises between the wife and a third person, the husband not being a party."

2. Having seen that the defendant in error had the capacity to acquire a separate domicile for herself, it is easily seen upon the agreed statement of facts submitted that she had in fact done so.

That the defendant in error had gone to Virginia with the intention of making her home in that state for an indefinite time was sufficient to confer upon her such citizenship as entitled her to sue in the Federal courts. It was contended in the court below, and we presume will be contended here, that even if the defendant in error had the capacity to acquire a separate domicile the statement of facts fails to show that she had the requisite intention of becoming a citizen of Virginia. It is difficult to see upon what ground such a contention could be supported, The language of the stipulation is that she had gone to the State of Virginia "with the intention of making her home in that State for an indefinite time in order that she might institute this suit against the defendant in the United States Court." Residence coupled with an intention of remaining for an indefinite time constitutes domicile. *Mitchell* vs. *United States*, 21 Wall. 350, 352; *White* vs. *Brown*, 29 Fed. Case No. 17538, pages 982, 995; *Young* vs. *Pollak*, 85 Ala. 439; *Salem* vs. *Lynn*, 29 Conn. 74. 80; *Smith* vs. *Croom*, 7 Fla. 81, 152; *Verret* vs. *Bonrillian*, 33 La. An. 1304, 1307, 1308; *Church* vs. *Powell*, 49 Me. 367; *Wilton* vs. *Falmouth*, 15 Me. 479, 481; *Wilbraham* vs. *Ludlow*, 99 Mass. 587, 591, 592; *McCon-*

nell vs. *Kelley*, 138 Mass. 372; *Whitney* vs. *Sherborn*, 12 Allen, 111, 113, 114; *Concord* vs. *Romney*, 45 N. H. 423, 427; *Valentine* vs. *Valentine*, 61 N. J. Eq. 400, 407; *Hegeman* vs. *Fox*, 31 Barb. 475, 476; *Kellar* vs. *Baird*, 5 Heisk, 39, 46; *Ex parte Blumer*, 27 Texas 734, 738, 739; *State* vs. *Casinova*, 1 Texas 401; *Frame* vs. *Thurman*, 102 Wis. 653, 656; *Brittenham* vs. *Robinson*, 48 N. E. 616, 617; *Anderson* vs. *Estate of Anderson*, 1 Am. Rep. 334, 336; *Doucet* vs. *Geohegan*, 9 Chan. Div. 444, 453; *Haldane* vs. *Eckford*, L. R. 8 Eq. 631, 640; *Loustolan* vs. *Loustolan*, L. R. (1900) P. D. 211, 231; *Jacobs' Law of Domicile*, Sec. 67.

The Court said in *Ennis* vs. *Smith*, 14 How. 400, 423: "A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it." In *Mitchell* vs. *United States*, 21 Wall. 350, 352, the court said: "Domicile has been thus defined: 'A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.'" Mr. Justice Harlan in *Morris* vs. *Gilmer*, 129 U. S. 315, 328, 329, said: "He went to Tennessee without any present intention to remain there permanently or for any indefinite time, but with the present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit."

The court said in *Greene* vs. *Windham*, 13 Me. 225, 228:

> "Whoever removes into a town for the purpose of remaining there for an indefinite period, thereby establishes his domicile in that town. It is not necessary that he should go with a fixed resolution to spend his days there. He might have in contemplation many contingencies, which would induce him to go elsewhere. Some persons are more irresolute in their character, and migratory in their habits than others, but they may and do acquire a domicile wherever they establish themselves for the time being, with an intention to remain, until inducement may arise to remove."

Shaw, C. J., in *Thorndike* vs. *Boston*, 42 Mass. 242, 246:

> "In reference to this evidence, the jury were instructed that if they were satisfied that the plaintiff went abroad, not for the mere purpose of traveling, or

> for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live, in the event of his return to the United States, then he ceased to be an inhabitant of Boston, liable to taxes.
>
> "We think this direction, in connection with the subject matter to which it applied, is correct. The actual change of one's residence with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of a change of domicile, and unless controlled by other circumstances is decisive."

"Permanently," as used in the definition of residence, means that there must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, used as a converse of "transient," and expresses the idea of an abode which may be temporary, but is not transient. *Austen* vs. *Crilly*, 13 N. Y. App. Div. 247. "A permanent abode is a home which a party may leave as interest or whim may dictate, but which he has no present intent to abandon." *Sullivan* vs. *Detroit Y. & A. A. R. Co.* (Mich.), 64 L. R. A. 673, citing *Dale* vs. *Irwin*, 78 Ill. 170.

Mr. Justice Washington, in *The Venus*, 8 Cranch 253, 279:

> "If it sufficiently appear that the intention of removing was to make a permanent settlement, *or for an indefinite time, the right of domicile is acquired by a residence even of a few days.* This is one of the rules of the British courts, and it appears to be perfectly reasonable."

Judge *Story* says (*Conflict of Laws*, 8th Ed., Sec. 46, p. 50):

> "Eighthly: If a person has actually removed to another place, *with an intention of remaining there for an indefinite time, and as a place of fixed present domicile*, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period."

President Post in *Guier* vs. *Danice*, 1 Binn. 349, 352, defines domicile thus: "A residence at a particular place accompanied with positive or presumptive proof of continuing it an unlim-

ited time." This is commended and adopted by the learned English judge and writer, *Phillimore* (*Law of Domicile* No. 15; also *Int. Law*, vol. 4, No. 49) as the most accurate of all the definitions.

"The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." *Price* vs. *Price*, 156 Pa. 617. 626.

Mr. *Wharton* says (*Conflict of Laws*, Sec. 21, p. 77).

> "Domicile is a residence acquired as a final abode. To constitute it there must be (1) residence, actual or inchoate; (2) a nonexistence of any intention to make a domicile elsewhere."

Judge Snyder, delivering the opinion of the West Virginia court, said in *White* vs. *Tennant*, 13 Am. St. 896, 898:

> "A change of domicile does not depend so much upon the intention to remain in a new place for a definite or indefinite period, as upon its being without intention to return. An intention to return, however, at a remote or indefinite period to the former place of actual residence will not control, if the other facts which constitute domicile all give the new residence the character of a permanent place of abode."

The Court said, in *Johnson* vs. *Smith*, 43 Mo. 499, 501:

> "For a man's domicile is where he has fixed his ordinary dwelling, without a present intention of removal, and that domicile may be changed to another, notwithstanding the party, on his departure, may cherish a secret purpose of returning at some indefinite time in the future."

The Court said in *Wilbraham* vs. *Ludlow*, 99 Mass 587, 591, 592:

> "It must be borne in mind that this was the case of one who has abandoned his former dwelling place, either with no intention of return, or at the most with such vague, indefinite and remote purposes in this respect that they would not prevent him from readily acquiring a new domicile wherever he might go. The person was a day laborer, without family, separated by

> judicial decree from his wife. Such a man, so situated, when he is laboring in one town with no intention as to residence except to have a home wherever he works, may well be deemed to live there with the purpose of remaining for an indefinite period of time, and thus to have there all the home he has anywhere, as much of a domicile as such a wanderer can have."

Mr. *Dicey* says (*Conflict of Laws,* p. 108, Rule 7):

> "Every independent person can acquire a domicile of choice, by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*) but not otherwise."

The same learned author continues (*Conflict of Laws,* p. 111):

> "The main problem in determining the nature of domicile, in so far as it depends upon choice, consists in defining the character of the necessary intention or animus. The difficulty lies partly in the nature of the thing itself, partly in the different views which courts and writers have at different times entertained, as to the nature and definiteness of the requisite intention or purpose. The best definition or description of the requisite animus appears to be 'the present intention of permanent or indefinite residence in a given country,' or (if the same thing be expressed more accurately, in a negative form) 'the absence of any present intention of not residing permanently or indefinitely in a given country.'"

In the brief filed in the court below the defendant in error quotes from the dissenting opinion of Chief Justice Marshall in *The Venus,* to the effect that to constitute domicile there must be an intention to remain always. This statement was taken by the great Chief Justice from *Vattel,* in whose time the law of domicile had not received the extensive discussion or been reduced to the accurate statement of more recent times. The numerous citations and quotations which we have made show that such an opinion has never been adopted. The following quotations show the utter futility and inexpediency of any attempt to exact any such requirement in the constitution of domicile:

Mr. *Wharton* says (*Conflict of Laws,* p. 82):

"The definition of Vattel is, 'a fixed residence is any place, with an intention of always staying there.' Judge Story, in commenting on this, justly remarks: 'This is not an accurate statement. It would be more correct to say that the place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.'"

"So to acquire a new residence it is not necessary for a person to reside in a place with the purpose of making it his permanent home and residence. It is enough if he resides there with the intention to remain for an indefinite period of time, and without any fixed or certain purpose to return to his former place of abode." *Palmer* vs. *Hampden,* 182 Mass. 511, 513. See *Gartin* vs. *Draper Coal & Coke Co.,* 78 S. E. 673, 676.

Judge *Story* says (*Conflict of Laws,* Sec. 43, p. 43, Eighth Edition):

"Vattel has defined domicile to be a fixed residence in any place with an intention of always staying there, but this is not an accurate statement. It would be more accurate to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

Parker, J., delivering the opinion of the court in *Putnam* vs. *Johnson,* 10 Mass. 488, 501:

"The definition of domicile, as cited from Vattel by the counsel for the defense, is too strict, if taken literally, to govern in a question of this sort; and, if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicile as a habitation fixed in any place, with an *intention of always staying there.* In this new and enterprising country it is doubtful whether one-half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there.* They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life, and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their homes in their chosen abode while they remain. Probably the meaning of Vattel is, that the habitation fixed in any

> place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the citizens of this country."

Anderson vs. *The Estate of Anderson, supra,* is instructive: An insane man, Charles D. Anderson, who had his domicile at Woodstock, Vt., was removed by his family to an insane asylum at Brattleboro, Vt. Soon thereafter a guardian was appointed for him. Mrs. Anderson removed to Montpelier, Vt., until his death, or until his sanity should be restored. Upon the death of Anderson, at the asylum, the question arose in what county an administrator of his estate should be appointed. It was held that the family domicile was at Montpelier, Vt., the court saying, "the circumstances disclosed by the testimony tend to show that the guardian in the exercise of his discretion might remove and he did remove, Mrs. Anderson to Montpelier with the intention of remaining there for an indefinite time and as the then fixed present domicile of the family, there to remain until the death of his ward or until his ward should become sane and manage his own affairs."

Indeed, the statement of facts shows more than is necessary for Federal jurisdiction. The agreed statement that Mrs. Osenton went to Virginia "with the intention of making her home in that state" is sufficient in itself without the addition of the words "for an indefinite time." The latter but add a strength which is not needed. For the word "home" itself implies permanency. Home means the fixed abiding place. *Fry Election Case,* 71 Pa. 302, 307; *Thomas* vs. *Warner,* 83 Neb. 14; *Warner* vs. *Thomaston,* 43 Me. 406, 418; *Dicey on Conflict of Laws,* ch. 2, p. 82, *et seq.*

> "The home of a person is where the person turns for social life; where his family, if he has one, usually dwells, and to which his mind turns when away; and where he has the present purpose of returning and remaining. It is not the place where a man happens to be temporarily residing, even though it be with his family, for a man may, for convenience sake, have a temporary residence and quasi home, which is not his home and residence proper; and, unless he has abandoned the latter for the former, with the intention of remaining permanently from it, the newly chosen residence is not his home." *Tyler* vs. *Murray,* 57 Md. 418, 441, 442.

A temporary residence is not a home. *Thayer* vs. *Boston*, 124 Mass. 132. Domicile is the technical legal statement of the conception of home. *Dean* vs. *Cannon*, 37 W. Va. 123, 127. The words "home" and "domicile" are substantially synonymous. *Hart* vs. *Ham*, 4 Kas. 232, 238; *Smith* vs. *Croom*, 7 Fla. 81, 152, 153; *Township of Jefferson* vs. *Township of Washington*, 19 Me. 293, 301; *King* vs. *King*, 155 Mo. 406; *Doucet* vs. *Geohegan*, 9 Chy. Div. 441, 456. The place of a man's domicile is the place of his home. *Foss* vs. *Foss*, 58 N. H. 293. The fundamental idea of domicile is home. *Wood* vs. *Roeder*, 45 Neb. 311, 315. "No one word is more nearly synonymous with the word domicile than our word home." *Venable* vs. *Paulding*, 19 Minn. 488, 492; *Krum* vs. *Cooper*, 43 Ark. 547, 549; *White* vs. *Brown*, 29 Fed. Case No. 17538, pp. 982, 995.

> "We like this conception of the word home, which constitutes the commanding element of the definition given in the Roman law, as well as those given by these two modern jurists. It is the word whose essential meaning comes up fully to our idea of domicile. It is a word which admits not of qualification. To speak of a permanent home is to perpetrate a tautology—to speak of a temporary home is to involve a contradiction of terms. It is a word which finds its true interpretation in the instincts of our nature. It is a word the full meaning of which is of universal application; it is understood alike by the degraded savage and the classic Greek—by the republican serf and the refined Roman. Wherever that spot is found there the law fixes the domicile of succession." * * * *Smith vs. Croom*, 7 Fla. 81, 153.

Chitty, J., in *re Craignish* (1892), 3 Ch. Div. 180, 192: "A man may be in fact homeless, but he cannot be in law without a domicile. Subject to this distinction the term 'home' in its ordinary popular sense is practically identical with the legal idea of domicile. *Dicey on Domicile*, (2)." "Permanent abode" as used in Rev. St. 1874, p. 460, declaring that a permanent abode is necessary to constitute a residence within the meaning of the law relating to elections means nothing more than a domicile, a home, which a party is at liberty to leave as interest or whim may dictate, without any present intention to

change it. It need not be an abode which the party does not intend to abandon at any future time. *Dale* vs. *Irwin*, 78 Ill. 170, 181, quoted in *Berry* vs. *Wilcox*, 44 Neb. 82.

"Permanent abode" as used in Rev. St. c. 46, Sec. 66, providing that a person must have a permanent abode other than the state as an inseparable requisite in the right to vote, means nothing more than a domicile, a home, which the party is at liberty to leave temporarily as interest or whim may dictate, and an unmarried man, who spends his time when ill or out of work at the home of a friend, who allows him to call it his home, and leave there his personal effects, has a permanent abode there, though he spends much of his time away from such house, in attending to his business or visiting his relatives. *Moffatt* vs. *Hill*, 131 Ill. 239.

"In its ordinary acceptation, by the term 'domicile' is meant the place where a person lives or has his home."

Hairston vs. *Hairston*, 27 Miss. 704, 718; *Story Conflict of Laws*, 8th Ed. Sec. 41; *Hart* vs. *Lindsey*, 17 N. H. 235, 242, 243, 244; *Horne* vs. *Horne*, 31 N. C. 99, 107.

It was contended in the court below that since the statement of facts shows that the defendant in error went to Virginia, in order that she might institute this suit in the Federal court, therefore she can not have acquired citizenship there for lack of requisite intention. It was not said that her motive would defeat domicile, but the argument was in this wise: She went to Virginia in order that she might bring this suit; therefore she did not intend to remain beyond the time necessary for the prosecution of the suit, and therefore she did not have an intention to remain in that State for a sufficient time to satisfy the requirements of domicile. This argument, if its validity were admitted, would result in this: That no one could acquire a citizenship in a State if his purpose, or one of his purposes, in doing so was to enable himself to sue in a Federal court. It has been recognized too long that a *bona fide* intention to acquire a new domicile may consist with the single purpose or motive of suing in the Federal court for it to be questioned at this late day. But let us examine this argument from another aspect. We will repeat the argument: Mrs. Osenton went to the State of Virginia that she might bring an action in the

Federal court; therefore she would not be likely to intend a stay in that State longer than the prosecution of her suit required; therefore she did not have the requisite intention. All this is but conjecture, at best mere inference, or inference upon inference. Against it and against these inferences, built one upon another, we have the positive statement of the agreed facts that she had gone to the State of Virginia "with the intention of making her home in that State for an indefinite time." It is to us a new rule of construction if an inference or a conjecture from one portion of a paper can thus overcome the direct and positive statements in another part of that same paper. We have always understood that every part of a paper was to be given a natural and normal meaning when possible, but the rule of construction contended for by the plaintiff in error would make one part of a paper a monster which should turn upon and devour another part.

The fact that she went to the State of Virginia and took up her residence there in order that she might institute this suit in the Federal courts cannot be urged. Her motive is entirely immaterial. Mr. Justice Brown, in *Dickerson* vs. *Northern Trust Company*, 176 U. S. 181, 191, 192:

> "The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into motives which actuated the parties in making the conveyance. *McDonald* vs. *Smalley*, 1 Pet. 620; *Smithy* vs. *Kernochen*, 7 How. 198; *Barney* vs. *Baltimore*, 6. Wall. 280; *Farmington* vs. *Pillsbury*, 114 U. S. 138; *Crawford* vs. *Neal*, 144 U. S. 585. The law is equally well settled that, if a person take up a *bona fide* residence in another state, he may sue in the Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the state in which the court was held. *Cheever* vs. *Wilson*, 9 Wall. 108, 123; *Briggs* vs. *French*, 2 Sumn. 251; *Catlett* vs. *Pacific Ins. Co.* 1 Paine 594; *Cooper* vs. *Galbraith*, 3 Wash. 546; *John-*

son vs. *Monell,* Wool. 390." The last paragraph of the above is quoted with approval by Mr. Justice Brewer, delivering the opinion of the court in *South Dakota* vs. *Carolina,* 192 U. S. 286, 311.

Respectfully submitted,

CONNOR HALL.
R. G. LINN,
C. BEVERLEY BROUN.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

NO. 634.

MARGARET H. WILLIAMSON, PLAINTIFF IN ERROR,

vs.

KATHERINE OSENTON, DEFENDANT IN ERROR.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR DEFENDANT IN ERROR.

R. G. LINN,
C. BEVERLEY BROUN,
CONNOR HALL.

In the argument of counsel for plaintiff in error that the defendant in error in this cause did not possess sufficient capacity to acquire a separate domicile, it is laid down as a fundamental proposition that a married woman, even when justified in leaving her husband, cannot acquire a separate domicile for any purpose, except that of bringing a suit directly involving the marriage relation. (Page 5). To this it is sufficient to answer directly in the language of this court that "the rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so." *Cheever* vs. *Wilson; Haddock* vs. *Haddock.*

In distinguishing some of the authorities cited on behalf of the

defendant in error, attention is called in the brief of the plaintiff in error to the fact that those cases were probate cases (Page 9). It is difficult to see why that fact should make any difference. Differences in cases not based upon any distinction in principle are as valueless as they are easy to discover. In these cases which we have cited the inquiry was: "Had the married woman capacity to acquire a separate domicile?" Domicile in a probate case is in no way different from domicile in another case, and none of the opinions which we have cited treat domicile in probate cases as being any limited or qualified domicile.

On pages 11 and 12 it is said: "The next authority cited is *Haddock* vs. *Haddock*, 201 U. S. 562. This was a case involving what is known as the 'full faith and credit' clause of the Constitution. There a suit was brought in a State other than the domicile of matrimony against a wife who was still residing in that State of the domicile, and it was held that such a divorce was not a proceeding *in rem* as to marriage relation, and was not entitled to be enforced outside the territorial jurisdiction of the court." This is not all that was held in that case. The husband and wife had lived together in New York. He abandoned her and went to Connecticut, the wife remaining in New York. In Connecticut he sued for and obtained a decree of divorce. It was held that the Connecticut court did not have jurisdiction to render the decree, for the reason that the wife was not domiciled in that state. Now if the domicile of the wife always followed that of the husband this holding would have been impossible, for then the domicile of Mrs. Haddock would have been in Connecticut, following that of her husband; but this was expressly held not to be the case.

In discussing the case of *Prater* vs. *Prater*, cited in the brief for defendant in error, it is said (pages 12, 13) that in that case "the court held to the old rule, to-wit, that she, having remained out of the state without the consent of her husband, had forfeited her right to homestead in lands owned by the husband." We are not aware of the existence of any such "rule" which is here spoken of as being an old one. Homestead is not alimony; it is an exemption allowed by the state to resident heads of families, and

in no way depends upon conjugal merit. The relations of the husband and wife do not affect the question. The inquiry is, "Is the claimant of the homestead the head of a family and a resident of the state?" and we call attention to the fact that in that case the court treated the quesion as one of domicile.

Watertown vs. *Greaves* and *Gordon* vs. *Yost* would be distinguished from the case at bar upon the ground that there the husband had deserted the wife. To this it may be answered that the present case shows that the husband had committed a violation of marital duty such as entitled the wife to a divorce. When this is true, then the wife is justified in leaving him, and the husband, and not the wife is the party responsible for the separation. Not only has she a right to go, but in order to protect her rights she is compelled to do so. If she remain she condones the offense and bars her right. At this point it may be well to call attention to the use of the word "desert" and "deserted," in the brief of the plaintiff in error (pages 15, 19). Mrs. Osenton, the defendant in error, is said to have "deserted" her husband. This is a misuse and perversion of language. Mr. Osenton had violated his marital duties, so that she was entitled to go; so that in no sense can she be said to have "deserted" him.

On page 18 and following pages extended argument is entered into to show that the defendant in error had not in fact acquired a domicile in Virginia. It is objected that no reason is shown for her going; that no home tie is proven to have existed in that state, and much more of the same kind. The agreed statement of fact shows that Mrs. Osenton had separated herself from her husband and gone to the state of Virginia, with the intention of making her home in that state for an indefinite time. This is a correct and definite statement in the language of the books of all the elements necessary to the acquirement of a domicile. The objections of the plaintiff in error amount only to this: That the agreed statement of facts does not set out in detail the evidence of the acquirement of a domicile. One of the first rules of pleading is that facts are to be pleaded according to their legal effect, omitting all details of evidence. Here is a clear admission, signed

by both parties, of all that is necessary in the acquirement of a domicile, and the court will not look further. Why should counsel for the plaintiff in error complain that no "home tie" is shown to have existed in Virginia, when the agreed statement signed by the counsel for both parties is that she had gone with the intention of making her home in that state? If she had a home it is to be presumed that she also had home ties, and the same may be said of all the other objections urged.

It is argued that as the motive of Mrs. Osenton in going to Virginia and acquiring citizenship there, was that she might sue in the Federal Court that therefore she could not have intended to remain the length of time requisite to the acquirement of a domicile. The argument is stated thus: "We submit that a fair interpretation of the agreed facts lead to the conclusion that Virginia was not intended by the defendant in error to be her *permanent* home and that the 'indefinite time' of making that State her home was to be measured by the purpose for which she went to Virginia, to-wit, 'in order that she might institute this suit,' and when this suit should be ended she would return to West Virginia." This argument reduced to its lowest terms is this: That since her motive in going to Virginia was to obtain a standing in the Federal Court, then she could not have intended to remain a sufficient length of time for the acquirement of citizenship, that is, that the motive of seeking Federal jurisdiction is exclusive of the intention to remain the requisite length of time. Now let us see where this statement, if accepted, would lead us; the result is that in no case could a real and *bona fide* citizenship be obtained if the motive of removal was to seek Federal jurisdiction; yet we know this is not true, for the Federal reports are full of cases where the motive of seeking Federal jurisdiction has been found entirely consistent with a real and *bona fide* intention to change the domicile.

On page 21 it is said: "We do not deny the rule that usually the court will not inquire into the motives of a party in doing an act such as making an assignment or changing his domicile. While we do not care why the plaintiff below wanted to invoke Federal

jurisdiction, we do care to know why she went to Virginia just before instituting this suit. That is the issue being tried, because one's domicile is part conduct and part intention." The issue is not "Why did she go to Virginia?" but "Was she domiciled there at the time of the institution of this suit?" The court does not care why she went to Virginia if she in good faith intended to remain indefinitely. And this is shown by the agreed statement. We may answer in the language of this court: "It is said that the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting." *Cheever* vs. *Wilson*, 9 Wall. 108, 123.

Respectfully submitted on behalf of Defendant in Error.

R. G. LINN,
C. BEVERLEY BROUN,
CONNOR HALL.

In the Supreme Court of the United States

October Term, 1913.

NO. 634.

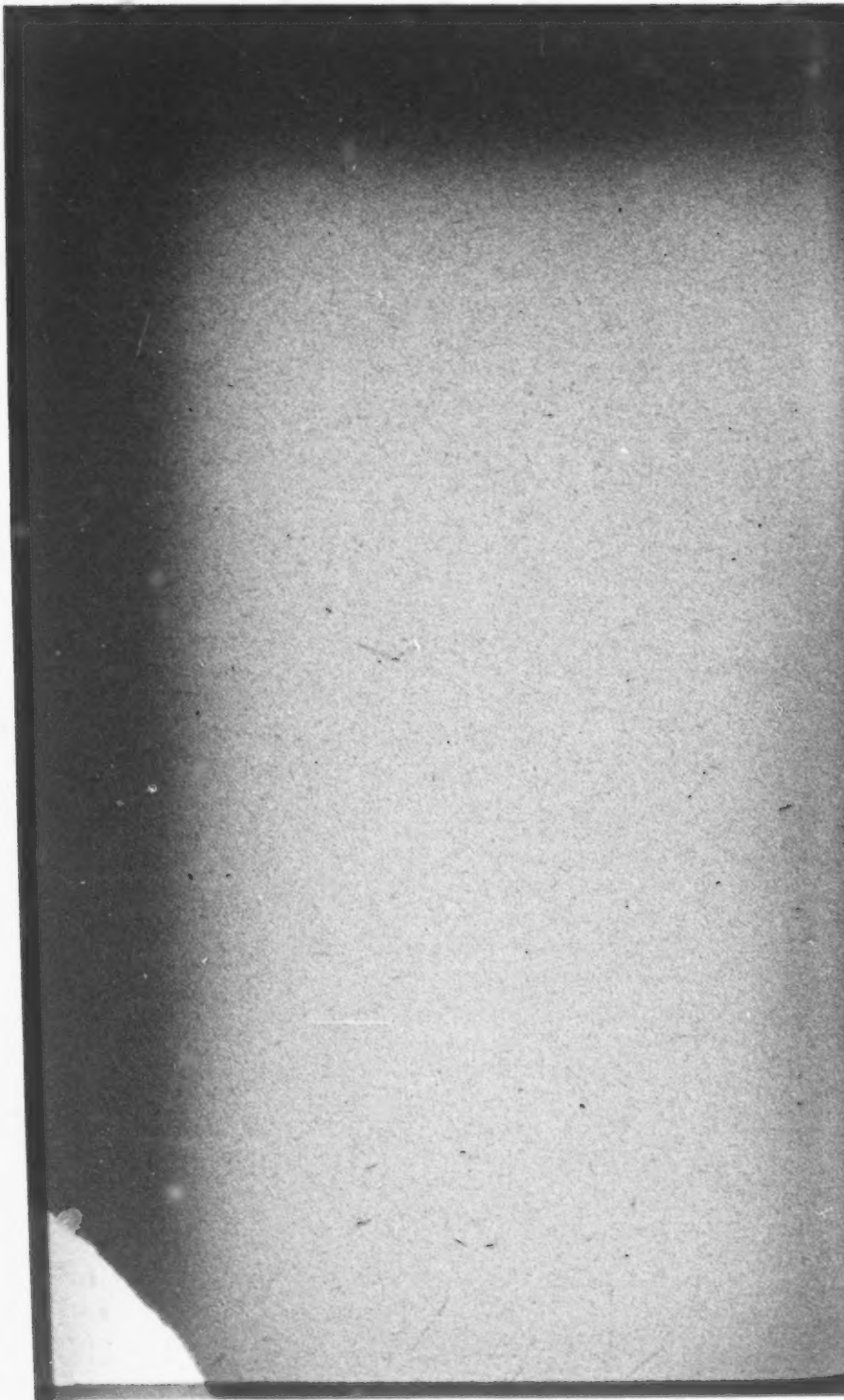
MARGARET H. WILLIAMSON, PLAINTIFF IN ERROR,

vs.

CATHERINE OSENTON, DEFENDANT IN ERROR.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO DISMISS OR TO TRANSFER TO SUMMARY DOCKET.



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MOTION TO DISMISS OR TO TRANSFER TO SUMMARY DOCKET.

Now comes Catherine Osenton, defendant in error, and moves the Court to dismiss the certificate of the Circuit Court of Appeals, or, if the Court should be of opinion that this is not proper, then to transfer this cause for hearing to a summary docket.

The more important facts in this case, as appearing in the certificate, are as follows: This action was instituted by Catherine Osenton in the District Court of the United States for the Southern District of West Virginia, to recover against the plaintiff in error, Margaret H. Williamson, damages for alienation of the affections of the defendant in error's husband. The declaration alleged that the plaintiff was a citizen of the State of Virginia and the defendant a citizen of the State of West Virginia. The defendant filed a plea denying that the plaintiff was at the time of the institution of the action a citizen of Virginia, as alleged. On the trial of the plea to the jurisdiction the parties agreed to and filed the following statement of facts: "That at the time of the institution of this suit the plaintiff was the lawfully wedded wife of C. W. Osenton, a citizen and resident of Fayette county, West Virginia; that prior to the institution of this action the said C. W. Osenton had committed violation of marital duty such as entitled the plaintiff to a decree of divorce *a vinculo;* that prior to the institution of this action the plaintiff had separated from her husband, the said C. W. Osenton, and had gone to the State of Virginia with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant in the United States Court; that prior to the institution of this action this plaintiff had instituted in the circuit court of the county of Fayette, State of West Virginia, a suit for absolute divorce from the bonds of matrimony with the said C. W. Osenton, and that such absolute divorce from the matrimony aforesaid has heretofore been granted her by decree of said circuit court, and these facts are admitted for the purpose of this plea only." The District Court held that the plaintiff was a citizen of Virginia at the time of the institution

of her action, and thereafter the defendant, having pleaded the general issue, a trial was had. A writ of error to the circuit court of appeals was sued out, and upon the hearing, that court certified, together with the facts, part of which are above set out, the following question: "Was the plaintiff, upon the foregoing statement of facts, such a citizen and resident of the State of Virginia, at the time of the commencement of this action, as to entitle her to bring and maintain the same in the District Court of the United States for the Southern District of West Virginia?"

The reasons now advanced for the motion of the defendant in error are:

First: The question presented in the certificate is such as not to require any extended consideration for its decision.

Second: The question involves only the jurisdiction of the District Court as a Federal Court.

Third: The question whether a married woman may acquire a separate domicile within the meaning of the acts of Congress conferring jurisdiction upon the District Courts of controversies between citizens of different states is one of general interest.

Fourth: A decision upon the other questions presented by the writ of error to the Circuit Court of Appeals is suspended until a decision of the question presented in the certificate.

The brief filed herein is confined to a discussion of the first point, but the defendant in error does not intend thereby to waive the other points herein assigned, her counsel being of the opinion that the others are not of such character as to call for discussion in brief.

Respectfully submitted, on behalf of defendant in error,

R. G. LINN,
C. BEVERLY BROUN,
CONNOR HALL.